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May 21, 1997

VIA FIRST CLASS MAIL

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EPA Region 5 Records Ctr.



274503

Re: Skinner Landfill Litigation

Dear Sherry:

For your information, I am enclosing copies of the following motions that we filed today in the Skinner Landfill litigation:

- (1) Plaintiffs' Motion to Consolidate the two private cost recovery actions that Plaintiffs have brought and an accompanying memorandum in support of that motion;
- (2) Plaintiffs' Motion for Entry of a Proposed Case Management Order, a Proposed Case Management Order, and an accompanying memorandum in support of that motion and of Plaintiffs' Suggestion of Complex Case; and
- (3) Plaintiffs' Suggestion of Complex Case.

The Proposed Case Management Order incorporates an alternative dispute resolution ("ADR") process that is substantially similar to that which accompanied my May 1, 1997 memorandum to all defendants in the Skinner litigation (a copy of which was forwarded to you separately). As you will note, we have kept the schedule at the back end of the ADR process intact, so that the Allocator's preliminary and final non-binding allocation reports remain due on the dates originally scheduled, i.e., December 22, 1997, and March 13, 1998. However, based on comments only recently raised by certain of the defendants that the time period allocated for selection of an allocator was insufficient, Dan Dozier agreed that an extension of that period --

BEVERIDGE & DIAMOND, P. C.

Ms. Sherry Estes

May 21, 1997


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and, therefore, periods allotted for certain activities set to occur prior to the time responses to the allocation questionnaire are due -- was warranted.

To accommodate these concerns, the plaintiffs agreed to a modest extension of the deadlines for those early activities. However, the deadlines for the questionnaire responses and all subsequent ADR activities remain the same as those set forth in the May 1, 1997 ADR Procedure previously sent you.

Please give me a call if I can answer any questions you may have regarding the ADR process or other aspects of the Skinner Landfill cost recovery litigation.

Sincerely,



Karl S. Bourdeau

KSB:trs

Enclosure

cc: Dan Dozier (with enclosure)

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FILED

MAY 20 1997

KENNETH J. MURPHY, Clerk  
CINCINNATI, OHIO

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT CINCINNATI, OHIO

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THE DOW CHEMICAL COMPANY, et al., )  
 )  
Plaintiffs, )  
 )  
 )  
v. )  
 )  
ACME WRECKING CO., INC., et al., )  
 )  
Defendants. )

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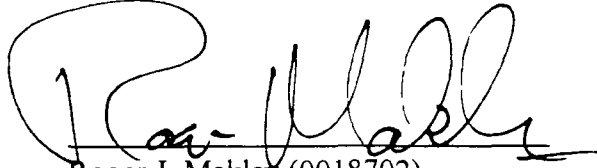
Civil Action No. C-1-97-0307  
Judge Weber

**PLAINTIFFS' MOTION TO CONSOLIDATE  
CIVIL ACTION NO. C-1-97-0308 WITH THIS CASE**

Pursuant to Fed. R. Civ. P. 42(a), Plaintiffs The Dow Chemical Company, Ford Motor Company, GE Aircraft Engines, Morton International, Inc., PPG Industries, Inc. and Velsicol Chemical Corporation move this Court to consolidate Civil Action No. C-1-97-0308 with the present action, on the grounds that the two actions involve common questions of law and fact and that in the interest of judicial economy both cases should proceed together. This Motion is supported by the accompanying Memorandum.

May 20, 1997

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roger J. Makley", written over a horizontal line.

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE  
CIVIL ACTION NO. C-1-97-0308 WITH THIS CASE**

Plaintiffs filed this action as well as Civil Action ("CA") C-1-97-0308 to recover from the Defendants in both actions Plaintiffs' environmental response costs in connection with the cleanup of the Skinner Landfill Superfund Site located in West Chester, Butler County, Ohio ("the Site"). Both Complaints are brought pursuant to Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") and Ohio common law.

The Complaint in CA No. C-1-97-0308 and the Complaint herein set forth identical allegations and claims for relief against the Defendants in the respective cases. Plaintiffs brought separate actions solely because their lead counsel, Beveridge & Diamond, P.C. is precluded by a potential conflict of interest from prosecuting the particular actions against the three Defendants in CA No. C-1-97-0308. Upon consolidation of these actions, Beveridge & Diamond, P.C. will continue to adhere to applicable ethical requirements regarding these Defendants.

Because both cases share common questions of law and fact, the cases should be consolidated for purposes of discovery and trial. Fed. R. Civ. P. 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42(a) was designed and intended to encourage the consolidation of cases wherever possible. United States v. Knauer, 149 F.2d 519, 520 (7th Cir. 1945), aff'd, 328 U.S. 654 (1946). The purpose of the rule is to permit trial convenience and economy in case administration. Fields v. Wolfson, 41 F.R.D. 329, 330 (S.D.N.Y. 1967); see also Manual for Complex Litigation § 20.123, at 13 (3d ed. 1995).

The Sixth Circuit Court of Appeals described the factors a trial court must consider when deciding whether to consolidate cases:

[W]hether the specific risks of prejudice and possible confusion [are] overcome by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993) (quoting Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985)).

In this case, Defendants in both cases will suffer no prejudice by consolidation. As noted above, these claims initially were filed separately only because Beveridge & Diamond, P.C. has a potential conflict of interest against the three Defendants in the second action. The claims against the Defendants in both cases are identical and Defendants in both cases are potentially liable parties under the same federal statute. Both cases arise from the necessity of determining those parties who are legally responsible for an environmental cleanup at the Site. There is no true distinction among Defendants, except for the extent of responsibility.

To the extent needed in light of the non-binding alternative dispute resolution (“ADR”) process Plaintiffs have proposed for all Defendants in both cases,<sup>1</sup> the discovery and pretrial process in both cases will be the same and will involve many of the same witnesses. Moreover, due to the size

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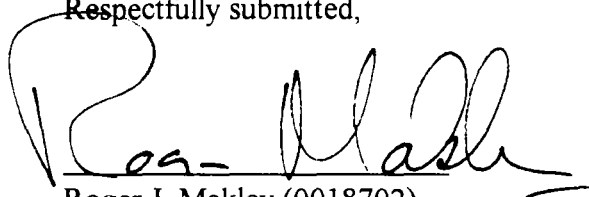
<sup>1</sup>See Plaintiffs’ May 20, 1997 Motion for Entry of a Case Management Order and Proposed Case Management Order.

and complexity of issues surrounding this Superfund site,<sup>2</sup> it is in the interest of judicial economy that the two cases proceed together through ADR and any litigation that might be necessary.

This court has broad discretion in ordering consolidation of the two cases, Stemler v. Burke, 344 F.2d 393, 396 (6th Cir. 1965), and may issue an order of consolidation on its own motion, despite objections of any of the parties. Cantrell, 999 F.2d at 1011. Plaintiffs request this court to exercise that discretion and consolidate the two cases in the interests of judicial economy and maintaining consistency in this complex litigation.

May 20, 1997

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roger J. Makley", written over a horizontal line.

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<sup>2</sup>See Plaintiffs' May 20, 1997 Memorandum in Support of Motion for Entry of a Case Management Order.

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was served by regular U.S. mail, postage prepaid, this 20th day of May, 1997, upon the following:

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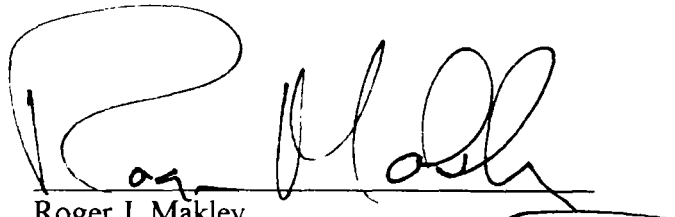
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	)	
Plaintiffs,	)	Civil Action Nos.
	)	C-1-97-0307 and C-1-97-0308
	)	(Consolidation Motion Pending)
v.	)	
	)	
ACME WRECKING CO., INC., et al.,	)	
	)	
Defendants.	)	Judge Weber
<hr/>		
THE DOW CHEMICAL COMPANY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SUN OIL COMPANY d/b/a SUNOCO OIL	)	
CORP., et al.,	)	
	)	
Defendants.	)	
	)	

WHEREAS, these consolidated actions for response costs, contribution, and declaratory judgment under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. (“CERCLA”), and state common law involve over 90 parties (“the Parties”) with a variety of interests;

WHEREAS, these actions have been designated as “complex” and as requiring special handling pursuant to Rule 16.3 of the Local Rules of the United States District Court for the Southern District of Ohio (“S. D. Ohio L. R.”);

WHEREAS, this Court has determined that the just, efficient, cost-effective, and prompt resolution of these actions requires entry of a case management and scheduling order pursuant to Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure and S. D. Ohio L. R. 16.2, and that an orderly process is required to expedite and coordinate pretrial procedures, facilitate settlement negotiations, and conserve judicial resources;

WHEREAS, S. D. Ohio L. R. 53.1 expressly provides that the Court, in its discretion, may assign any civil case for non-binding alternative dispute resolution; and

WHEREAS, it appears that the Parties have all been afforded an opportunity to participate in the development of a non-binding alternative dispute resolution process that is substantially similar to that provided for in this Order, and that that process is supported by a significant number of the Parties;

It is on this \_\_\_\_ day of May, 1997 hereby ORDERED:

1. In order to enable the Parties to engage in a process designed to achieve a cost-effective and timely resolution of claims related to the environmental remediation of the Skinner Landfill Superfund Site in West Chester, Ohio (the “Site”), the Parties, including parties added hereafter, shall all participate in the non-binding Alternative Dispute Resolution Procedure set forth herein (the “Process”). The Process is intended to provide an opportunity to resolve all issues among the Parties relating to these claims.

2. Except as provided for in paragraphs 10.b and 27 below, all answers, pleadings, motions, discovery, and trial preparation proceedings as to the Parties are stayed until further Order of the Court to allow the Process, set forth in paragraphs 3 to 26 herein, to proceed.

3. **Selection and Responsibilities of Allocator.** Pursuant to a procedure in which all Parties are being provided an opportunity to participate, an Allocator will be selected by June 3, 1997 to assist the Parties in resolving all claims asserted for costs that have been or will be incurred in connection with the Site. The Allocator is authorized to address any and all issues in dispute among the Parties in connection with the Site pursuant to, and in accordance with, the Process and schedule set forth herein. The Allocator is expressly authorized to determine a zero share of response costs for a Party in the non-binding Preliminary and Final Allocation Reports and Recommendations provided for in paragraphs 13 and 16 herein.

4. **Submission of Documents and Information.** By June 16, 1997, the Allocator shall submit to all Parties and the United States Environmental Protection Agency ("USEPA") a Service List of Parties who should be served with documents in the Process, including addresses, telephone numbers, facsimile numbers, and counsel. In accordance with paragraph 26 below, each Party is responsible for notifying the Allocator of any changes to information contained on the Service List, and the Allocator shall promptly update the Service List to account for such changes and circulate the updated Service List.

5. **Document Repository.**

a. By June 20, 1997, two Document Repositories shall be established. The first Document Repository shall be established and maintained by the Allocator at his place of business. The second Document Repository ("local Document Repository") shall be established and maintained in this District at a place operated by an entity unaffiliated with any of the Parties and agreeable to

a majority of the Parties. The Document Repositories shall maintain copies of all information and documents submitted by the Parties as a result of the Process, the reports of the Allocator provided for under the Process, and the documents described in paragraph 6 below. All documents, materials and other information submitted during the course of the Process shall be provided by the Parties to both the Allocator and to the local Document Repository for placement in the repositories.

b. Access to the repositories shall be controlled, and the Allocator and the local Document Repository shall consult to establish uniform methods for logging all visitors, pre-approval of visitors, and other related procedures and services. Only Parties may have access to and/or obtain copies of documents in the repositories. Parties requesting copies of repository documents must request such copies in writing or make advance arrangements to visit either Document Repository, and pay \$0.15 per page and paralegal charges of \$65 per hour or other customary charges of the local Document Repository. Notwithstanding the foregoing, no Party shall have access to the Document Repositories if it has failed to pay all charges then due and owing for previous use of the repositories and for Joint Expenses in accordance with paragraph 23 below.

**6. Review of USEPA Documents by Allocator.**

a. By June 24, 1997, the Allocator shall review all relevant available documents pertaining to the Site in the possession of USEPA. The Allocator will review, at a minimum, responses to CERCLA Section 104(e) information requests, relevant portions of the Administrative Record for the Site, and all other relevant documents related to the source, nature, and volume of waste materials sent to the Site, or to the investigation or remediation of Site conditions.

b. The Allocator shall request copies of all such documents which, based on the Allocator's judgment, are relevant to the allocation, and shall have such documents placed in the two Document Repositories. The Allocator shall also place in the Document Repositories copies of (a)

the Site nexus materials previously provided to Defendants, which shall be provided to the Allocator by the Plaintiffs, and (b) to the extent available from USEPA, the Agency's investigative files relating to parties potentially responsible for response costs at the Site. The Allocator shall arrange to have all documents uniquely numbered and shall prepare an index of the documents received that references the unique number ranges. The Allocator will then send to the local Document Repository a copy of the documents, including a machine-readable copy of the database and the index.

7. **Initial Document Repository Completion Date.** Following receipt of documents requested from USEPA as provided in paragraph 6 above, but no later than June 27, 1997, the Allocator shall provide written notice ("Initial Document Repository Completion Date"), with a copy of the Document Repository index, to the Parties indicating that the initial document repository is complete.

8. **Skinner Landfill Site Questionnaire.** By June 9, 1997, the Allocator shall distribute to all Parties the Skinner Landfill Site Questionnaire ("Questionnaire"). The Questionnaire, and all definitions and instructions included therein, is incorporated in this Order and hereby made a part hereof. All Parties must respond to the Questionnaire, in accordance with its definitions and instructions, by July 15, 1997 by sending all responses, requested documents, and the completed certification to the Allocator and to the local Document Repository. Any Party that names another Party in its Questionnaire responses shall serve that relevant portion of the response on such Party. If a Party learns, subsequent to submission of its Questionnaire response, that its response is incomplete or incorrect, that Party shall promptly supplement its response in writing, as provided for in the certification to the Questionnaire.

9. **Supplemental Update to Document Repository.** By July 25, 1997, the Allocator shall provide written notice ("Supplemental Document Repository Update Notice") to the Parties that

the Questionnaire responses have been received, uniquely numbered, indexed, copied and placed in the Document Repositories. The Allocator shall also provide the Parties by that date a copy of the revised index of the Document Repository and notice of any Party that failed to submit its Questionnaire response by July 15, 1997. The Allocator and the local Document Repository shall promptly update the Document Repository index to reflect supplemental responses to the Questionnaire.

10. **Identification of Additional Participating Parties.**

a. Any Party may identify in writing to the Allocator and to all other Parties additional entities or individuals ("potential additional parties") that it believes should participate in the Process in order to derive a fair and equitable allocation. The Allocator shall notify USEPA of any potential additional parties so identified.

b. Any Party identifying a potential additional party shall, in addition to identifying that party, provide to the Allocator the name, address and phone number of the potential additional party's representative, and all information (including copies of documents or other material) which provide the basis for the belief that such party should participate in the Process. Unless leave to amend the consolidated complaints ("Complaint") in this action has already been granted pursuant to paragraph 27 below, Plaintiffs may seek leave of the Court to amend the Complaint to add a newly identified party as a Defendant. Any motion seeking leave to add a party shall be filed within 14 days of receipt by one or more of the Plaintiffs of notice from another Party that it believes the potential additional party should participate in the Process, or, in the case of identification of a potential additional party by one of the Plaintiffs, within 14 days of the date notice is sent to the Allocator and other Parties. Any such motion shall include a proposed schedule for activities relevant to the

additional party's participation in the Process that is both reasonable and consistent with the purposes and, to the extent practicable, the schedule for the remainder of the Process.

c. Regardless of whether the Plaintiffs file a motion for leave to amend the Complaint pursuant to paragraph 10.b, if the Allocator, based on the information submitted regarding a potential additional party and in his sole discretion, determines that there is a reasonable basis to conclude that the potential additional party may be responsible for response costs at the Site, the Allocator shall promptly notify that party and offer it the opportunity, for a period of 7 days, to decide whether it wishes to participate in the Process. If the party commits in writing to do so, the Allocator shall establish a schedule for activities relevant to that party's participation that is both reasonable and consistent with the purposes and, to the extent practicable, the schedule for the remainder of the Process.

d. All Parties will be promptly notified by the Allocator of any additional parties participating in the Process and of deadlines or other provisions for participation by such additional parties.

e. The Process set forth in this Order shall apply to all additional parties added as Defendants pursuant to paragraphs 10.b or 27 of this Order (hereinafter also referred to as "Parties"), except that the schedule for the Process with respect to such Parties shall be that approved by the Court.

11. **Follow-up Discovery Requests to Questionnaire Responses.** After submission of Questionnaire responses, but no later than August 26, 1997, any Party may request that the Allocator obtain additional information or documents from any Party or any other source. Any such request shall be in writing, and shall state the reasons for the request and the expected nature and source of the information or documents. The Allocator, in his sole discretion, will determine whether to obtain

the information. The Allocator shall have the authority to request additional information that the Allocator believes necessary to prepare allocation reports, independent from any specific requests received from Parties. The Allocator may request assistance from USEPA in obtaining information, which may include use of USEPA's subpoena power. The process for obtaining additional information shall conclude by October 10, 1997.

12. **Initial Position Papers.** By November 10, 1997, any Party wishing to do so shall submit an initial position paper to the Allocator. The position paper may address any factual or legal issues related to that Party's Questionnaire responses. The position papers shall be no longer than 20 pages, exclusive of attachments, and copies of the papers shall be sent by November 10, 1997 by the Parties submitting them to the local Document Repository.

13. **Preliminary Non-Binding Allocation Recommendations.** By December 22, 1997, the Allocator shall issue a Preliminary Non-Binding Allocation Report and Recommendations ("PNARR") addressing the positions and issues raised by the Parties, and making a recommendation regarding an equitable allocation of costs at the Site. The PNARR shall assign a percentage share of costs to each Party and all other entities and individuals (hereinafter collectively referred to in this paragraph as "parties") that the Allocator determines should be assigned a percentage share, including Site owners and operators and "orphan" shares, and shall indicate how the allocation criteria or any other equitable factors were applied to each such party. The PNARR shall contain, to the extent possible, a description of the decisions made with respect to each party's contribution to the Site, and a description of the methodology used to determine allocated shares for all such parties.

14. **Initial Comment Briefs.** By January 21, 1998, any Party wishing to do so may submit a brief to the Allocator regarding factual information, factual analysis, expert opinion, if any, legal argument, and other relevant comments regarding the allocation set forth in the Preliminary

Non-Binding Allocation Report described in paragraph 13 above. Any Party may address its own allocation, the proposed allocation percentages of any other Party, and/or a rationale for any proposal regarding allocation. Such briefs shall be no longer than 30 pages, exclusive of attachments. Copies of such briefs shall be sent by January 21, 1998 by the Parties submitting them to the local Document Repository.

15. **Reply Briefs.** By February 11, 1998, any Party may submit to the Allocator a reply brief, no longer than 20 pages, exclusive of attachments. A reply brief may address arguments made by any other Party in its Initial Comment Brief. Copies of such reply briefs shall be sent by February 11, 1998 by the Parties submitting them to the local Document Repository.

16. **Final Allocation Report.** By March 13, 1998, the Allocator shall issue the Final Non-Binding Allocation Report and Recommendations ("FNARR") addressing all of the issues and recommending an equitable allocation of costs at the Site. The FNARR shall assign a percentage share of costs to each Party and all other entities and individuals (hereinafter collectively referred to in this paragraph as "parties") that the Allocator determines should be assigned a percentage share, including Site owners and operators and "orphan" shares, and shall indicate how the allocation criteria or any other equitable factors were applied to each such party. The FNARR shall contain, to the extent possible, a description of the decisions made with respect to each party's contribution to the Site, and a description of the methodology used to determine allocated shares for all such parties.

17. **Allocation Process Schedule Overview.** Based on the procedures set forth above, the Parties and the Allocator shall observe the following schedule for reaching a final non-binding allocation of liability for costs associated with the Site:

June 9, 1997	Distribution of Questionnaire
June 16, 1997	Distribution of Service List of Parties

June 20, 1997	Creation of Document Repositories
June 20, 1997	Initial Payment of Joint Expenses Due
June 24, 1997	Completion of Review of USEPA Documents by Allocator
June 27, 1997	Distribution of Initial Document Repository Completion Notice
July 15, 1997	Responses to Questionnaire Due
July 25, 1997	Distribution of Supplemental Document Repository Update Notice
August 26, 1997	Requests for Follow-up Discovery Due
October 10, 1997	Conclusion of Follow-up Discovery
November 10, 1997	Initial Position Papers Due
December 22, 1997	Preliminary Non-Binding Allocation Report and Recommendations Issued
January 21, 1998	Initial Comment Briefs Due
February 11, 1998	Reply Briefs Due
March 13, 1998	Final Non-Binding Allocation Report and Recommendations Issued

**18. Settlement Negotiations.**

a. Following the issuance of the Allocator's Final Non-Binding Allocation Report and Recommendations, the Parties shall conduct settlement negotiations. The Court expects such negotiations to be intensive and to include frequent communication among the Parties.

b. If a complete settlement allocating among the Parties responsibility for all claims made regarding response costs at the Site ("the Allocation Settlement") has not been achieved among the Parties by May 13, 1998, the Parties shall report that fact and the status of settlement discussions to the Court by May 20, 1998, and shall submit proposals to the Court by that same date as to how settlement negotiations should proceed, if at all. Those proposals may include the use of

mediation or other alternative dispute resolution techniques to attempt to reach an Allocation Settlement. The Court will schedule a conference to determine how and under what conditions further settlement negotiations shall proceed, or how other management of this case should be structured.

19. **Good Faith.** All Parties shall act in good faith in all aspects of the Process.

20. **Ex Parte Contacts.** No Party may engage in *ex parte* discussions with the Allocator regarding Site allocation or other substantive issues. All non-substantive discussions or contacts with the Allocator regarding the Site, such as logistics or requests for information, must be memorialized by the Allocator. The Allocator shall maintain a log, which shall be available for inspection by any Party, listing all non-substantive *ex parte* communications, including (a) the names of the persons taking part in any such communication, including identification of the initiator of the communication and the Party represented; (b) the date, time, and method of the communication; and (c) a summary of the substance of the communication.

21. **Late Submissions and Page Limits.** All submissions to the Allocator and other Parties must be timely (as provided for in paragraph 26 below) and within the page limits specified herein, absent the Allocator's determination of good cause shown. Any requests for late submissions or requests to exceed page limits must state the reasons for the request and must be sent to the Allocator and the local Document Repository. Requests for page limit exceedances will only be granted by the Allocator upon receipt of a request at least one full day prior to the deadline for submission and upon good cause shown. Requests for late submissions will only be granted if they are received at least one full day prior to the deadline for submission and, in the judgment of the Allocator, the submission can be addressed in the allocation in a timely manner and granting the

request will not cause an inequity among other Parties, or failure to grant the request will result in a manifest inequity to the Party seeking the extension.

22. **Modifications to the Process.** If the Allocator concludes, either on the Allocator's own initiative or as a result of a proposal from one or more of the Parties, that a modification should be made to the Process, including, but not limited to, modifications to any deadline established herein, the Allocator shall promptly notify all the Parties. Upon receipt of such notice, or in the absence of such notice, any Party or group of Parties may seek a modification of the Process by moving the Court for an amendment of this Order.

23. **Joint Expenses.**

a. "Joint Expenses" shall consist of fees and costs of the Allocator incurred pursuant to an agreement acceptable to the Parties with the Allocator; administrative costs (including the cost of meeting rooms, group telephone conference calls, etc.); and the cost of maintaining the two Document Repositories. Joint Expenses shall not include legal and technical fees incurred by an individual Party.

b. Each Party shall pay a per capita share of all Joint Expenses incurred in the Process. The Parties shall pay \$3,000 each by check payable to Coolidge, Wall, Womsley & Lombard Trust Account to initially fund the Process. This payment shall be made no later than June 20, 1997 and shall be sent to the offices of Coolidge, Wall, Womsley & Lombard, 33 West First Street, Suite 600, Dayton, Ohio 45402-1289.

c. Coolidge, Wall, Womsley & Lombard is authorized to establish an escrow account for all Joint Expenses. Coolidge, Wall, Womsley & Lombard shall maintain that account with a minimum balance of \$20,000. If, at any time, the balance drops below that amount, Coolidge, Wall, Womsley & Lombard is authorized, after consultation with the Allocator, to invoice all Parties

a per capita amount so as to fund reasonably expected expenses. The Parties shall pay additional amounts invoiced, if any, by the reasonable date established by Coolidge, Wall, Womsley & Lombard.

d. Any funds remaining in the escrow account at the end of the Process shall be returned promptly to the Parties on a per capita basis, provided that the Party has fully paid all Joint Expense assessments and charges incurred pursuant to paragraph 5 above.

24. **Confidentiality.** In order to facilitate the Process and keep confidential the Parties' and the Allocator's conduct and statements in connection with the Process, and to ensure that information and documents submitted by the Parties or developed by the Allocator in connection with this process remain confidential, including, but not limited to, the Allocation Reports and Recommendations prepared by the Allocator, position papers, Questionnaire and document request answers and responses, affidavits, expert reports, answers to questions from the Allocator, conversations and meetings among the Parties and conversations between any Party and the Allocator ("Shared Information"), the following confidentiality provisions shall apply:

a. Shared Information disclosed by any Party to the Allocator or any other Party shall be retained by the Allocator, all persons working for the Allocator in connection with the Process and all Parties receiving such information subject to the provisions of this Order.

b. Except as set forth in this paragraph 24, Shared Information submitted by any Party to the Allocator or any other Party shall be held in confidence, shall not be used for any purpose other than participation in the Process, and shall not be disclosed outside of a Party's organization. Notwithstanding the preceding sentence, Shared Information may be disclosed by a Party to the Party's counsel and consultants, persons assisting such counsel and consultants in the Process, and insurance carriers or indemnitors who agree to be bound by the confidentiality provisions of this Order. In addition, any Party may disclose any Shared Information submitted during the Process to

the extent that the information relates solely to its own alleged responsibility for Site costs or the responsibility of a related person or entity for whom the Party is sought to be held responsible. In the event of unauthorized disclosure of Shared Information, the Allocator may make such rulings and determinations as are appropriate and/or a Party may ask the Court to issue such order as necessary to prevent the further disclosure of the information.

c. Shared Information that is exchanged and is intended to be kept confidential should be marked “confidential” or with a similar legend. If such information becomes the subject of an administrative or judicial order requiring disclosure of such information by a Party, where the information will be left unprotected by confidentiality obligations, the Party may satisfy its confidentiality obligations hereunder by notifying the Party or Parties that generated the information and by giving such Party or Parties a reasonable opportunity under the circumstances to protect the confidentiality of the information.

d. Except as set forth in this paragraph 24, the entire Process, including, without limitation, the Allocation Reports and Recommendations prepared by the Allocator and the position papers, briefs, Questionnaire responses, affidavits, expert reports, answers to questions from the Allocator, reply briefs, and all conversations and meetings among the Parties, shall be held in confidence and shall constitute compromise negotiations protected from disclosure under Federal Rule of Evidence 408. All such information exchanged in connection with the Process shall be held in confidence subject to the terms of these provisions, unless each Party agrees in writing, or as required by law, statute, or order of a Court. No claim of privilege or exception from discovery shall be deemed waived by reason of submission or distribution of any Shared Information described in this paragraph or conversations and meetings among the Parties and the Allocator.

e. Notwithstanding any other provision of this paragraph, Shared Information received from any Party or its counsel pursuant to the Process may be shown, produced or relayed by the receiving Party to its own agents, including, but not limited to, its accountants, insurers or indemnitors, and attorneys and/or persons working under supervision of such counsel (the “Agents”), provided that such Agents agree to be bound by the confidentiality provisions of this Order. All Parties shall take reasonable and appropriate precautions against the inadvertent disclosure of Shared Information by their Agents.

f. These confidentiality provisions shall remain in full force and effect whether any action arising out of the Site is terminated by final judgment or settlement, and shall survive the litigation.

g. The Allocator shall not be subject to discovery in any court or administrative tribunal with regard to the Process, including, without limitation, all Shared Information submitted by any Party under these confidentiality provisions, nor shall the Allocator be subject to discovery regarding the process, analysis or decisions of the Allocator rendered during this Process.

h. These confidentiality provisions shall not be asserted as a basis to withhold from production documents or information existing prior to the date of this Order and produced by a Party in connection with the Process that are otherwise discoverable pursuant to the Federal Rules of Civil Procedure or federal statutes at such time that a Party becomes subject to discovery requests in this or any other litigation or administrative proceeding.

i. The confidentiality provisions herein shall not be applicable if the documents or information are already or become available to other Parties or the public from another source.

25. **Effect of Participation in the Process.** Neither the Process nor participation by any Party in the Process shall be deemed, construed or used as evidence of an admission of liability, law

or fact, or a waiver of any right or defense. Each Party expressly denies its liability under CERCLA and any other federal, state or local statute or common law for response costs or damages associated with the Site. Participation in the Process shall be without prejudice to any position a Party may take in this litigation or in other matters.

**26. Notice and Exchange of Written Materials.**

a. Whenever notice is required to be given or a document is required to be forwarded to Parties in connection with the Process, it shall be directed to the individual at the addresses specified in the Service List provided for in paragraph 4 above. Any changes to information included in the Service List of Parties must be provided promptly by the Party involved to the Allocator. The Allocator must furnish to the other Parties within three business days notice of amendments to the Service List, including the addition of new parties to the Process.

b. All submissions to the Allocator and the local Document Repository shall be sent to arrive at the offices of the Allocator and the local Document Repository on the dates set forth above in paragraph 17 or those otherwise authorized by the Allocator pursuant to paragraphs 10.c or 21, or ordered by the Court. The Allocator shall send the Questionnaire to the Parties to arrive on the date set forth in paragraph 17 or those authorized by the Allocator pursuant to paragraph 10.c or ordered by the Court. With respect to all other documents and notices to be furnished by the Allocator, the Allocator shall ensure that such documents and notices are placed in the Document Repositories by the dates specified in paragraph 17, and shall place such documents and notices in regular first class mail to all the Parties by the dates specified in paragraph 17.

27. Plaintiffs are granted leave to file an amended Complaint for the purpose of adding additional defendants through July 30, 1997. Plaintiffs may seek leave of the Court to amend the Complaint after this date for that purpose pursuant to paragraph 10.b above.

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was served by regular U.S. mail, postage prepaid, this 20th day of May, 1997, upon the following:

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CLARKE'S COMPLETE COLLECTION

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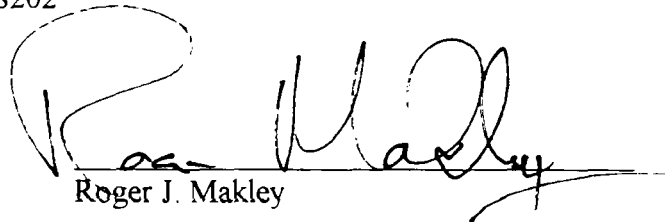
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FILED

MAY 20 1997

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CINCINNATI, OHIO

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT CINCINNATI, OHIO

*Order Attached*

\_\_\_\_\_  
THE DOW CHEMICAL COMPANY, et al.,

Plaintiffs,

v.

ACME WRECKING CO., INC., et al.,

Defendants.

Civil Action Nos.  
C-1-97-0307 and C-1-97-0308  
(Consolidation Motion Pending)

Judge Weber

\_\_\_\_\_  
THE DOW CHEMICAL COMPANY, et al.,

Plaintiffs,

v.

SUN OIL COMPANY d/b/a SUNOCO OIL  
CORP., et al.,

Defendants.

**PLAINTIFFS' MOTION FOR ENTRY OF A CASE MANAGEMENT ORDER  
AND FOR EXPEDITED DISPOSITION OF PLAINTIFFS' MOTION**

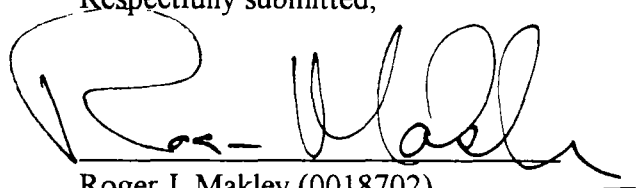
Pursuant to Fed. R. Civ. P. 16 and S.D. Ohio L.R. 7.1(c), Plaintiffs The Dow Chemical Company, Ford Motor Company, General Electric Aircraft Engines, Morton International, Inc., PPG

Industries, Inc. and Velsicol Chemical Corporation ("Plaintiffs") move the Court to enter the accompanying proposed Case Management Order and for expedited disposition of Plaintiffs' Motion. The proposed Order would stay Civil Action Nos. C-1-97-0307 and C-1-97-0308 in their entirety pending a non-binding alternative dispute resolution process designed to achieve a cost-effective and timely resolution of responsibility for remediation of the Skinner Landfill Superfund Site in West Chester, Ohio. Contemporaneous with this Motion, Plaintiffs have moved for consolidation of these two actions, pursuant to Fed. R. Civ. P. 42(a), and have filed a Suggestion of Complex Case, pursuant to S. D. Ohio L.R. 16.3.

The bases for Plaintiffs' Motion for Entry of a Case Management Order and for Expedited Disposition of Plaintiffs' Motion, as well as for Plaintiffs' Suggestion of Complex Case, are set forth in the Memorandum in Support accompanying this Motion. The bases for Plaintiffs' Motion to Consolidate Civil Actions No. C-1-97-0307 and C-1-97-0308, which involve identical claims, are set forth in the memorandum of law accompanying that Motion.

For the reasons stated in the attached Memorandum in Support, Plaintiffs respectfully request that the Court consider on an expedited basis Plaintiffs' Motion for Entry of a Case Management Order, grant Plaintiffs' Motion, and enter the proposed Order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Makley", written over a horizontal line.

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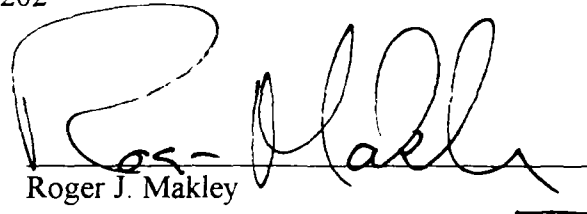
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Ros-Makley

Roger J. Makley

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT CINCINNATI, OHIO

THE DOW CHEMICAL COMPANY, et al.,	)	
	)	
Plaintiffs,	)	Civil Action Nos.
	)	C-1-97-0307 and C-1-97-0308
	)	(Consolidation Motion Pending)
v.	)	
	)	
ACME WRECKING CO., INC., et al.,	)	
	)	
Defendants.	)	Judge Weber
	)	
THE DOW CHEMICAL COMPANY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SUN OIL COMPANY d/b/a SUNOCO OIL	)	
CORP., et al.,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION  
FOR ENTRY OF A CASE MANAGEMENT ORDER  
AND FOR EXPEDITED DISPOSITION OF PLAINTIFFS' MOTION**

**I. INTRODUCTION**

Plaintiffs The Dow Chemical Company, Ford Motor Company, General Electric Aircraft Engines, Morton International, Inc., PPG Industries, Inc. and Velsicol Chemical Corporation

("Plaintiffs") submit this Memorandum in support of their motion for entry of the accompanying proposed Case Management Order ("CMO") and Plaintiffs' request for expedited disposition of that motion. The proposed CMO would stay this complex litigation in its entirety for approximately one year while the more than ninety parties in these two actions<sup>1</sup> engage in a non-binding alternative dispute resolution ("ADR") process designed to enable the parties to achieve a cost-effective, efficient, and prompt negotiated settlement of all claims regarding responsibility for remediation of the Skinner Landfill Superfund Site in West Chester, Ohio ("the Site").

Plaintiffs' claims, which arise under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. §§ 9601 *et seq.*, and state common law, are for costs they have incurred in undertaking environmental response actions at the Site, and for costs they expect to incur as a result of further demands by the United States Environmental Protection Agency ("USEPA" or the "Agency") under CERCLA for additional cleanup of the Site. The Defendants, virtually none of whom have contributed thus far to Site cleanup, have been identified in various investigations conducted by USEPA or Plaintiffs as users of the Site (or are otherwise alleged to be liable parties under CERCLA). USEPA itself has identified most of these Defendants as parties that it believes are potentially responsible for Site cleanup costs.

The ADR process embodied in the proposed CMO is the product of discussions over the last two months in which Plaintiffs invited all Defendants to participate. USEPA endorsed those discussions, proposed the use of an ADR process to resolve responsibility for Site response costs, and retained a neutral "facilitator" who assisted the parties in devising an ADR procedure that would

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<sup>1</sup> Plaintiffs have filed a pending motion to consolidate Civil Action Nos. C-1-97-0307 and C-1-97-0308 to ensure the orderly management of these actions, which raise identical claims.

be fair, effective and consistent with the tight schedule USEPA has established for taking further action at the Site. As a result of the parties' discussions, a large number of Defendants have already indicated their agreement to participate in the ADR process with Plaintiffs in return for a stay of litigation during the pendency of that process.

To ensure an orderly case management process, facilitate a global and speedy settlement among all the parties, and conserve judicial resources, Plaintiffs request that the Court exercise its inherent case management authority under the local rules to order all the parties to participate in the settlement process set forth in the proposed CMO. To enable that process to occur within the short timeframe in which the parties in this litigation must decide whether to respond affirmatively to USEPA demands that they undertake or pay for further cleanup of the Site, Plaintiffs further request the Court to enter the proposed Order as expeditiously as possible.

## II. BACKGROUND

### A. SITE ACTIVITIES

Upon information and belief, the Site was used as a landfill for disposal of a large variety of wastes from a large number of parties from approximately 1930 to 1990.<sup>2</sup> The Site was operated as a family-owned business from the time the Skinners purchased the property in 1947 until its closure in 1990.

As a result of previous investigations regarding contamination caused by waste disposal activities at the Site, USEPA placed the Skinner Landfill on the CERCLA National Priorities List ("NPL") of high priority sites for cleanup in December 1982. In 1986 and 1989, the Agency

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<sup>2</sup> According to Site investigations conducted by USEPA, these wastes include, but are not limited to, various chemical wastes, paint wastes, ink wastes, creosote, pesticides, construction and demolition debris, and household refuse.

conducted Remedial Investigations at the Site which identified certain organic and inorganic chemicals in soil and, to a lesser extent, in groundwater. In August 1990, the Ohio Environmental Protection Agency ordered the Site closed to all landfilling activities.

In December 1992, USEPA issued a unilateral administrative order to Plaintiffs and fourteen other parties to conduct certain interim response measures at the Site.<sup>3</sup> Plaintiffs and only one of the other order recipients complied fully with USEPA's order, at a cost of more than \$500,000.<sup>4</sup>

In March 1994, Plaintiffs and five other parties, while expressly denying liability, cooperated with USEPA and agreed to enter an administrative consent order with the Agency to conduct the remedial design for the final remedial action USEPA determined was necessary at the Site pursuant to its June 1993 Record of Decision ("ROD"). Plaintiffs and only one of the other order recipients complied fully with that consent order, at a cost of more than \$1.1 million.<sup>5</sup> The remedial design developed by Plaintiffs and approved by USEPA in June 1996 calls for a number of activities estimated to cost \$9.1 million.<sup>6</sup> In addition to these costs and other costs of Plaintiffs, including over \$100,000 in costs to identify and investigate companies that used the Skinner Landfill, USEPA has incurred at least \$3.5 million of unreimbursed past costs (as of September 30, 1995) that it intends

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<sup>3</sup> These measures included construction of a fence around contaminated portions of the Site, onsite groundwater monitoring, and connection of an alternative water supply to potentially affected users of groundwater in the area. To date, there is no evidence of actual use by nearby residents of groundwater migrating from the Site.

<sup>4</sup> Three of the other order recipients partially complied with USEPA's order. The rest refused or otherwise failed to comply.

<sup>5</sup> The remaining parties who received a demand to undertake the remedial design either refused to sign the consent order, or refused or otherwise failed to comply with it even if they did sign.

<sup>6</sup> As required in the ROD, these actions include a landfill cover, certain down-gradient groundwater control measures, various monitoring activities, future land use restrictions, and other possible actions.

to seek from responsible parties. Consequently, the total Site response costs at issue are approximately \$14.3 million.

## B. INVESTIGATION OF RESPONSIBLE PARTIES

A number of investigations have now been undertaken to identify parties that have used the Site and may be legally responsible for the costs associated with investigating and remediating Site contamination.<sup>7</sup> For example, all members of the Skinner family that worked at the Site have been deposed or interviewed regarding operations of the landfill and identification of parties who used the Site. In addition, Elsa Skinner, who maintained the accounting records for the Skinner business for the entire time it was in operation, has provided an accounting ledger that documents some transactions spanning the period 1955 to 1987.

Several other investigatory efforts to identify users of the Site have been conducted as well. USEPA has conducted a responsible party search, taken administrative depositions of several Site

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<sup>7</sup> Generally speaking, four categories of parties are liable under Section 107(a) of CERCLA for response costs incurred at the Site: (1) current owners and operators of the Site, (2) those parties who owned or operated the Site at the time hazardous substances were disposed of there, (3) those parties (including municipalities and federal agencies) who by contract, agreement or otherwise arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances they owned or possessed that ended up at the Site (*i.e.*, “generators” of hazardous substances found at the Site), and (4) those parties who accepted hazardous substances for transport to, and selected, the Site (*i.e.*, “transporters” of hazardous substances to the Site). *See* 42 U.S.C. § 9607(a).

These parties are liable for both response costs incurred by the United States at the Site not inconsistent with the National Contingency Plan (“NCP”) promulgated by USEPA to govern CERCLA cleanups, *see* 40 C.F.R. Part 300, and other necessary costs incurred by Plaintiffs consistent with the NCP. *Id.* The Courts have uniformly held that, absent exceptional showings by generators and transporters, those parties are liable for response costs regardless of how small the concentrations are of hazardous substances they sent to the Site. *See, e.g., B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199-1201 (2d Cir. 1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989); and cases cited therein. Courts also have fashioned liability principles by which successor corporations and parent corporations of liable parties can be held liable.

For an overview of the CERCLA liability and cleanup scheme, *see generally Manual for Complex Litigation* § 33.71, .72, at 366-70 (3d ed. 1995).

workers and individuals who transported waste to the Site, and obtained responses to two rounds of information requests under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), from a number of parties believed to have used the Site or otherwise have responsibility for Site conditions.<sup>8</sup> To supplement these efforts, the Plaintiffs hired a private investigation firm that conducted an extensive records search and interviewed numerous witnesses.

C. FILING OF THIS ACTION AND USE OF ADR

As a result of these investigatory efforts, USEPA and the Plaintiffs have concluded that many parties in addition to those who complied with USEPA's two administrative orders bear -- or likely bear -- legal responsibility for the final remedial action that the Agency intends to undertake or order undertaken.<sup>9</sup> Accordingly, in early 1997 USEPA sent letters to over 100 parties notifying them that the Agency had determined that they are potentially responsible parties ("PRPs") at the Site, and encouraging those parties to resolve among themselves relative responsibility for Site conditions. (See Exhibit 1 to this memorandum). In response to that letter, many parties indicated to USEPA an interest in participating in an ADR process to resolve responsibility for Site cleanup costs. Accordingly, the Agency, concurring that ADR was appropriate for this Site, sent a letter to the identified PRPs on February 11, 1997 notifying them of a March 11 meeting at which USEPA would

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<sup>8</sup> Under 42 U.S.C. § 9604(e), USEPA is authorized to obtain from any person information and documents relevant to the nature and quantity of materials transported to or disposed of at a facility, releases of hazardous substances, or pollutants and contaminants, at a facility, and the ability of a person to pay for or perform a cleanup.

<sup>9</sup> Under CERCLA, USEPA can either undertake response action at an NPL site using monies from the "Superfund" and seek to recover its costs, or order parties liable for response costs under the statute to undertake such actions in the first instance. See 42 U.S.C. §§ 9604, 9606, 9607.

offer the PRPs the assistance of a "facilitator" and use of an ADR process to help the parties design an equitable allocation procedure. (See Exhibit 2).<sup>10</sup>

Each of the Plaintiffs agrees that use of a non-binding ADR procedure would be useful to help resolve responsibility for Site response costs. However, all the Plaintiffs dispute their respective potential liability for Site conditions and believe, in the event they are nonetheless ultimately held liable, that their individual and collective responsibility is extremely small. Consequently, Plaintiffs, not wanting to be unfairly saddled with future response costs that investigations demonstrated should properly be borne by a much larger group of parties, decided to file this lawsuit to recover their past costs in addressing Site conditions and to ensure an equitable allocation of future costs.

Consistent with USEPA's determination that ADR represents the most cost-effective approach to achieving a prompt, fair, and reasonable allocation of these claims among the large number of parties involved, Plaintiffs sent a letter on February 28, 1997 to parties identified as a result of prior investigatory efforts encouraging the use of ADR. That letter informed those parties of the Plaintiffs' intention to file suit in March 1997, provided background information on the Site, explained the PRP investigations that had been undertaken, enclosed information regarding the nexus of each party to the Site, stated Plaintiffs' preference for USEPA's ADR path in lieu of proceeding with full-scale litigation, and indicated that Plaintiffs would take the initiative in developing an ADR protocol by providing at the March 11 meeting a draft ADR procedure that could serve as a starting

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<sup>10</sup> In its February 11 letter, USEPA offered to pay for the services of its facilitator for a short time to assist the parties to establish an allocation procedure that was fair and reasonable and to select an Allocator. However, USEPA stated its belief that it was important for parties participating in the ADR process to have a financial stake in its outcome and assume the remainder of the ADR costs.

point for developing a consensual ADR process that would be most effective for this particular Site (See Exhibit 3).

At the March 11 meeting, which was attended by representatives of more than 40 parties in this litigation, USEPA's consultants discussed the status of remedial work at the Site and summarized the costs incurred and expected to be incurred to implement the selected remedy. USEPA's counsel described the Agency's PRP search and the administrative enforcement history at the Site, and the facilitator described his role in assisting parties to agree upon an equitable ADR cost allocation process.

At that same meeting, counsel for Plaintiffs described Plaintiffs' interest in ADR, distributed a draft ADR protocol and questionnaire for each PRP's review and consideration, and provided a schedule for entertaining comments on and finalizing the ADR procedure in order to develop an acceptable ADR process. Counsel explained that the schedule for developing and conducting an ADR process, while ambitious, was driven by USEPA's own schedule, which then called for issuance by June 30, 1996 of so-called CERCLA "special notice" letters that trigger a 120 day statutory period in which USEPA would need to finalize a consent decree providing for the conduct of the final remedy by settling parties.<sup>11</sup> See Exhibit 2, at 2. On March 12, 1997, counsel for Plaintiffs sent a memorandum to identified parties who were not in attendance at the March 11 meeting summarizing what transpired there and furnishing the draft ADR documents and schedule for developing a final ADR process. (See Exhibit 4).

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<sup>11</sup> Under Section 122(e) of CERCLA, "special notice" letters inaugurate a 120-day enforcement moratorium during which USEPA is prohibited from initiating enforcement activities as long as a "good faith" offer is received from PRPs within 60 days of receipt of the special notice. 42 U.S.C. § 9622(e). Assuming such an offer is submitted, USEPA and the PRPs then have 60 additional days in which to negotiate an agreement for remedial actions before the Agency can use its enforcement authorities to order a cleanup.

On March 28, 1997, the Plaintiffs filed two separate actions in this Court naming different Defendants, but seeking identical relief.<sup>12</sup> Shortly thereafter, Plaintiffs sent letters to those named Defendants who were identified after the March 11 meeting, providing background on the Site and PRP investigations furnished at that meeting, the nexus packages for each such Defendant, the draft ADR procedure and questionnaire being developed by the parties, and the process for further development of the ADR approach. (See, e.g., Exhibit 5.) Plaintiffs did not serve the Complaint until April 10, providing all Defendants with Waiver of Service forms that, if completed and returned, would require the filing of answers by June 9.

Over the last two months, Plaintiffs have engaged in an intensive process of soliciting, responding to, and, where appropriate, incorporating comments received from Defendants on the draft ADR procedure and questionnaire. This process has involved reviewing and responding in writing to written comments on various drafts, conducting a joint conference call among all interested parties to discuss comments and concerns, and addressing numerous verbal comments. Plaintiffs have also sought the input of USEPA's facilitator throughout this process, working closely with him in evaluating comments received and formulating changes to the draft documents. As a result of these comments, substantial changes were made to the original draft procedure and questionnaire, culminating in a final ADR procedure and questionnaire that are set forth in the proposed CMO.

Plaintiffs have solicited the agreement of the Defendants to participate in good faith in an ADR process substantially similar to that set forth in the proposed CMO<sup>13</sup> in return for Plaintiffs'

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<sup>12</sup> As noted above, Plaintiffs have since moved for consolidation of those actions. The reasons for filing two actions and for consolidating the cases are set forth in the memorandum filed in support of Plaintiffs' May 20, 1997 Motion to Consolidate.

<sup>13</sup> In undertaking the conversion to a proposed CMO of the last ADR procedure sent to Defendants, Plaintiffs added certain provisions relevant to a litigation context and clarified or

agreement to participate in that same process and to seek a stay of all claims in the litigation during the pendency of the process. As of the filing of this motion, over sixty Defendants have already provided their written agreement to participate in the ADR process in lieu of litigating this matter at this time, or have indicated that they are inclined to participate. Only one Defendant, expressing cost concerns, has notified Plaintiffs in response to this solicitation that ADR is not its preferred course. Plaintiffs have not heard from the remainder of the Defendants.

### III. OVERVIEW OF THE PROPOSED CMO

With two limited exceptions, the proposed CMO would stay this entire litigation as to all parties and all claims during the pendency of the non-binding ADR process set forth in the CMO. Those exceptions would grant Plaintiffs leave to amend their Complaint as of right until July 30, 1997 to add additional parties newly identified in the early stages of ADR, and authorize the Plaintiffs to seek leave of the Court to add additional parties identified after that date. See Proposed CMO, ¶¶ 10.b, 27. All newly added parties would also participate in the same ADR process. Id.

The steps in the ADR process, and the schedule for that process, are summarized in ¶ 17 of the proposed CMO. As a general matter, these steps include:

- (1) selection of an Allocator who will address all issues in dispute among the parties<sup>14</sup>;
- (2) creation of two document repositories that will contain documents relevant to the allocation and to which all parties will have access (¶¶ 5-7, 9);

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refined a few aspects of the ADR process in ways that Plaintiffs believe will be unobjectionable. A list of substantive changes is set forth in Exhibit 6.

<sup>14</sup> Due to the tight timeframe within which an allocation must be performed given USEPA's schedule for making cleanup demands on the parties, a process in which all parties have been invited to participate is already underway to select an Allocator. The Allocator will be selected by written ballot on June 3, with one vote per party.

- (3) completion of a tailored Questionnaire by all parties so that documents and information relevant to a party's alleged contribution to the Site (or other responsibility for Site conditions and costs) can be furnished for the Allocator's consideration (§ 8);
- (4) opportunities for the identification of additional potentially responsible parties by any existing Plaintiff or Defendant (§ 10);
- (5) a period for follow-up information gathered by the Allocator to address issues posed by the Questionnaire responses (§ 11);
- (6) voluntary submission of position papers by the parties to address legal and factual issues related to each party's Questionnaire responses (§ 12);
- (7) issuance by the Allocator of a Preliminary Non-Binding Allocation Report and Recommendations assigning to parties percentage shares of Site costs, including a zero share of costs where the Allocator determines that a party should not be responsible for any costs (§ 13);
- (8) voluntary submission of initial and reply briefs regarding the allocation proposed by the Allocator (§§ 14-15); and
- (9) issuance by the Allocator of a Final Non-Binding Allocation Report and Recommendations assigning to parties percentage shares of Site costs, including again a zero share where the Allocator determines that result is warranted (§ 16).

Among other things, the proposed CMO also contains provisions regarding the confidentiality of the ADR process (§ 24) and for the payment by each party of a per capita share of the "Joint Expenses" of the ADR process (§ 23).<sup>15</sup>

Under the proposed CMO, once the Allocator's final report is issued on March 13, 1998, the parties would engage in a two month settlement process to attempt to resolve all claims in the case.

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<sup>15</sup> "Joint Expenses" consist of the fees and costs of the Allocator, administrative costs of the allocation process, and the costs of maintaining the two document repositories. Based in large part on the experience of the USEPA facilitator in ADR processes of this nature and for this type of matter, it was decided that an initial assessment of \$3,000 should be made to each party to fund the process. Although the ultimate costs of the ADR process are uncertain, it is hoped that this assessment, which is less than the anticipated costs of even the initial stages of traditional litigation, will be sufficient, given the number of parties, to fund the entire process.

The parties would report to the Court on May 20, 1998 on the status of settlement negotiations and make recommendations as to whether a further settlement process of some type, or alternative case management procedures, are warranted (§ 18).

The USEPA facilitator has informed Plaintiffs that he believes that this ADR process and schedule, while ambitious in an effort to meet USEPA's self-imposed deadline, is reasonable and feasible. Plaintiffs believe that it affords the parties and the Court an equitable, cost-effective, and speedy avenue for resolving the various claims among the numerous parties in this matter, while preserving for all parties their claims and defenses in the event no settlement, or only a partial settlement narrowing the parties and issues in this case, is achieved.

IV. THE PROPOSED CMO IS WITHIN THE COURT'S DISCRETION, AUTHORIZED BY LOCAL RULE, AND APPROPRIATE

A. The Proposed CMO Is Within the Court's Discretion and Expressly Authorized By Local Rule

A district court has inherent power to manage the disposition of a case to facilitate efficient and cost-effective litigation. See, e.g., Landis v. North Am. Co., 299 U.S. 248, 254 (1936). Within that power is board authority to stay proceedings. See id.; see also Beard v. New York Central Railroad Company, 20 F.R.D. 607, 609 (N.D. Ohio 1957).

Where litigation is likely to be complex,<sup>16</sup> the Federal Rules of Civil Procedure recognize the utility of "special procedures" to manage "potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ.

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<sup>16</sup> Pursuant to S.D. Ohio L.R. 16.3, Plaintiffs have filed contemporaneously with their proposed CMO motion a "Suggestion of Complex Case".

P. 16(c)(12).<sup>17</sup> See also Manual for Complex Litigation § 20.1, at 10 (3d ed. 1995) (“investment of time in case management in early stages of litigation will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, to economies of judicial time and a lessening of judicial burdens”).

Supplementing the inherent authority of a court to stay proceedings and order special procedures to effectively manage complex cases, Fed. R. Civ. P. 16(c)(9) expressly provides for the use of “special procedures to assist in resolving the dispute when authorized by statute or local rule.” Rule 16(c)(9) “acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties.” Fed. R. Civ. P. 16(c)(9) Advisory Committee Notes, 1993 Amendments. Included among these statutes and local rules are two that are particularly relevant for purposes of this Motion. First, 28 U.S.C. § 473(a)(6) directs each United States district court to consider civil justice expense and delay reduction plans, and to authorize referral of appropriate cases to such ADR programs that the court may make available. Second, in response to that mandate, this Court reaffirmed “its commitment to ADR and to the flexible approach reflected in Court Rule 53.1.” S.D. Ohio L.R., Appendix II, Civil Justice Expense and Delay Reduction Plan. Under Local Rule 53.1, the Court, in its discretion, may assign any civil case to nonbinding ADR.<sup>18</sup>

Clearly, then, the Court is authorized to stay this entire proceeding during the pendency of the non-binding ADR procedure set forth in the proposed CMO.

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<sup>17</sup> For example, Rule 16 (c)(12) provides “an explicit authorization” for ADR procedures and “encourages their use.” See Fed. R. Civ. P. 16(c)(12) Advisory Committee Notes, 1983 Amendments (referring to previous numbering of provision as 16(c)(10)).

<sup>18</sup> See also S.D. Ohio L.R. 16.3 (providing that in complex cases the Court will consider ADR methods likely to contribute to the cost-effective management of the case).

B. The Proposed CMO is Appropriate

The Manual for Complex Litigation ("MCL") recognizes that the liability and cleanup approach taken in CERCLA has "led to complex litigation unique in character," and that the number of parties and issues commonly involved in CERCLA litigation "typically calls for treating CERCLA cases as complex litigation." MCL § 33.7, at 366-67.<sup>19</sup> As a result, courts have routinely employed early CMOs in CERCLA litigation, and reported CERCLA decisions frequently reflect the use of CMOs to handle the breadth and complexity of issues posed by waste generation and disposal often spanning many decades. See generally MCL § 33.73, at 370-81. Not surprisingly, then, courts have not been reluctant to stay entire CERCLA proceedings to require all parties to explore settlement through various procedures.<sup>20</sup>

This case possesses the typical characteristics of CERCLA litigation warranting a CMO that provides for court-ordered nonbinding ADR. The case involves over 90 parties and a series of transactions extending over a 60 year period. Complex factual and legal issues pervade the case, stemming from, among other things, fragmented evidence and the existence of complicated successor and parent-subsidiary corporate relationships among a number of defendants that warrant further factual development.

Plaintiffs have undertaken a good faith effort to craft a consensual nonbinding ADR process that will (1) cost the parties significantly less than they would expend even in the early stages of

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<sup>19</sup> For these reasons and due to the particular circumstances of the instant litigation discussed in this Memorandum, Plaintiffs have filed with the Court, as noted above, a Suggestion of Complex Case.

<sup>20</sup> See, e.g., Foamseal, Inc., et al., v. The Dow Chemical Co., et al., CA No. 96-71129 and consolidated cases (E.D. Mich. January 9, 1997) (Order Appointing Special Master, staying all proceedings pending six months of confidential settlement conferences conducted by Special Master) (Exhibit 7).

traditional litigation; (2) provide a meaningful opportunity for a global settlement (or, at least, a narrowing of the issues and parties in the case); (3) be completed in a relatively expeditious period of time given the complex issues involved; (4) prejudice no defendant's defenses in the event settlement proves impossible; and (5) preserve significant judicial resources otherwise directed to the myriad of issues this litigation poses. By formally expressing their agreement to participate in the type of ADR process proposed, a large number of defendants have concurred that this process makes sense, and USEPA has endorsed this approach as a reasonable means of determining, within the time frame the Agency has concluded construction of the final remedy at the Site must commence, which parties should be responsible for funding that cleanup. Under those circumstances, the proposed CMO offers an optimal approach to an inherently complex and resource-intensive matter.

V. EXPEDITED DISPOSITION OF PLAINTIFFS' MOTION IS WARRANTED

Because USEPA has determined that construction of the final remedy for the Site should commence by spring of 1998, the time available for the parties to resolve among themselves who should bear what share of responsibility for Site cleanup costs is extremely short. Due to that tight timetable, the parties have crafted a highly streamlined ADR process whose schedule even the Agency's facilitator believes is ambitious.

If the ADR process is to achieve its objective, it must commence now.<sup>21</sup> Accordingly, Plaintiffs request that the Court expedite its disposition of their motion for entry of the proposed CMO. Plaintiffs also request expeditious disposition of their motion in order to relieve Defendants

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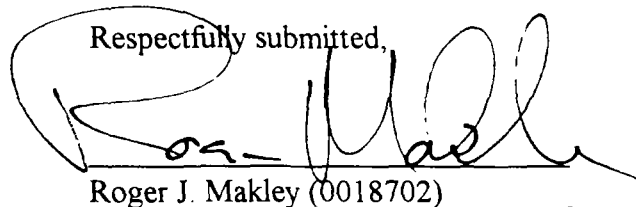
<sup>21</sup> As noted above, in light of the limited time available, the process has already begun, as all parties have been invited to participate in the ongoing selection of an Allocator pursuant to a procedure set forth in the ADR protocol all Defendants were asked to help craft.

who have signed Waiver of Service forms and agreed to participate in the ADR process of the need to answer the Complaint by June 9, 1997.

### CONCLUSION

The proposed CMO will establish an orderly course for this litigation at an early stage in the proceeding, conserve judicial resources, and promote the objective of CERCLA that those parties responsible for cleanup of hazardous wastes all contribute equitably to that cleanup. Plaintiffs respectfully request that the Court enter the proposed CMO forthwith.

May 20, 1997

Respectfully submitted,  


Roger J. Makley (0018702)

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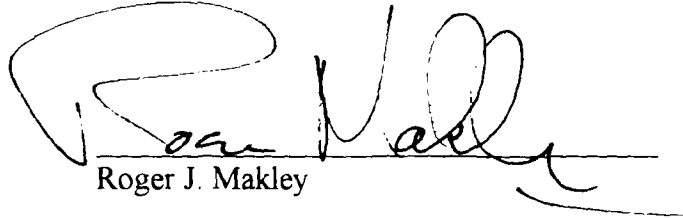
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## **Exhibits**

- Exhibit 1                      Early 1997 letter (sample) from Sherry L. Estes (USEPA) to PRPs notifying them of their status as PRPs at the Skinner Landfill Site, and list of recipients of this letter.
- Exhibit 2                      February 11, 1997 letter from Sherry L. Estes (USEPA) to PRPs re March 11, 1997 meeting in Cincinnati, Ohio
- Exhibit 3                      February 28, 1997 letter from Karl S. Bourdeau (on behalf of the Plaintiffs) to PRPs. **NOTE**: The attached letter is a sample of the letters sent out to the PRPs. Each letter included documents linking that entity to the Site. These attachments are not included in this Exhibit.
- Exhibit 4                      March 12, 1997 memorandum from Karl S. Bourdeau (on behalf of the Plaintiffs) which was sent via Federal Express to those PRPs who did not attend the March 11, 1997 meeting in Cincinnati, Ohio. **NOTE**: This memorandum included several documents which are not included herein. Attachments to the March 12, 1997 memorandum included copies of the sign-up sheet from the March 11 meeting, copies of the overhead projections which were presented at the meeting, and a draft version of the ADR Procedure and Questionnaire.
- Exhibit 5                      April 9, 1997 letter sent to PRPs identified after the March 11, 1997 meeting. **NOTE**: The attached letter is a sample of the same merge letter that was sent to the entities identified in the attached list. The April 9 letter included numerous attachments, including the March 12, 1997 memorandum (Exhibit 4) and its attachments, as well as the specific documents linking that entity to the Site. The attachments to the April 9, 1997 letters are not included herein.
- Exhibit 6                      List of substantive changes to provisions of the May 1, 1997 Skinner Landfill ADR Procedure.
- Exhibit 7                      Foamseal, Inc. et al. v. The Dow Chemical Co., et al., No. 96-71129 (E.D. Mich. Jan. 9, 1997) (Order Appointing Special Master)



## **Exhibit 1**

**Early 1997 letter (sample) from Sherry L. Estes (USEPA) to PRPs notifying them of their status as PRPs at the Skinner Landfill Site, and list of recipients of this letter.**



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CHICAGO, IL 60604-3590

Skinner 81  
x 34 (422)  
RECEIVED

JAN 10 1997

REPLY TO THE ATTENTION OF:

C-29A

January 8, 1997

Dow Chemical  
Attn: Mike Kay  
Legal Department  
2030 Dow Center  
Midland, MI 48674-2030

Re: ADR PROCESS FOR THE SKINNER LANDFILL NPL SITE

Dear Sir or Madam:

You are being sent this letter because U.S. EPA has determined that you are a potentially responsible party ("PRP") at the Skinner Landfill NPL Site (the "Site"), located in West Chester, Ohio. This determination is based upon information uncovered during an extensive investigation of records and witnesses pertaining to the Site. In order to aid in resolution of issues relating to the Site, U.S. EPA is requesting your participation in an alternative dispute resolution ("ADR") process to be convened in the near future. Please note that this notice is not being provided pursuant to CERCLA § 9622(e), because the use of those procedures at this time and the moratorium that those procedures entail are not appropriate. The Site has been selected by U.S. EPA to implement the principles of ADR and, therefore, U.S. EPA feels that additional flexibility concerning fund-financed work at the Site may be necessary.

By way of background, in 1976, in response to a Site fire and reports of a black, oily liquid in a waste lagoon on the Site, the Ohio EPA investigated the Site. In 1982, the U.S. EPA conducted a limited investigation for purposes of scoring the Site for inclusion on the National Priorities List ("NPL"). This investigation detected volatile organic compounds on the Site in the groundwater southeast of the buried waste lagoon. Pursuant to §105 of CERCLA, U.S. EPA placed the Site on the NPL in September 1983.

In 1985, U.S. EPA conducted a Phase I Remedial Investigation, which included the sampling of groundwater, surface water, and soils at the Site. In 1989, U.S. EPA performed a Phase II Remedial Investigation to further investigate the Site groundwater, surface water, soils and sediments. The groundwater analytical data developed during the RI revealed the presence of "hazardous substances" as defined in §101(14) of CERCLA. The Phase II Remedial Investigation was completed in May 1991. The Feasibility Study was completed in April 1992. In August 1990, Ohio EPA closed the Site to all further landfilling activities.

A Record of Decision for the Interim Action Operable Unit (consisting of Site fencing, the provision of alternate water supplies to potentially affected residents living near the Site who were using groundwater, and on-Site groundwater monitoring ) was signed by the Regional Administrator for Region V of the U.S. EPA on September 29, 1992. All activities required under this ROD were completed by a group of PRPs (the "Respondents") as of September 29, 1993.

The ROD for the second and the final of the two operable units at the Site was signed by the Regional Administrator on June 4, 1993. This second operable unit addresses potential future migration of Site contaminants into the groundwater and limits the potential for direct exposure of Site contamination to humans.

An Administrative Order on Consent for the Remedial Design ("RD") for the Site was entered in April 1994 with a sub-group of the original Respondents who completed work on the Interim Action Operable Unit. Work under this Order was completed in 1996. The final RD calls for the installation of a hazardous waste RCRA Subtitle C cap, and a groundwater collection system. The groundwater will be discharged to the local POTW.

U.S. EPA first began a search for potentially responsible parties in April 1983. The results of this investigation were later supplemented by information requests under CERCLA §104(e) in 1991 and 1994. In addition, U.S. EPA conducted administrative depositions in 1991 and 1994. Mrs. Elsa Morgan-Skinner, past and present owner and operator of the site, produced a large quantity of Site records at her deposition. Based on the information obtained through these efforts, as well as through the investigations and efforts of the Respondents, many additional PRPs have been identified. It is as a result of this work that your company is a recipient of this letter.

U.S. EPA suggests in the strongest terms that the PRPs participate in efforts to address this Site. "Exhibit A" attached hereto contains a list of the recipients to this letter. The United States believes that this matter has the potential for settlement and wishes to take steps toward an expeditious resolution. As stated above, U.S. EPA is taking steps to explore the PRPs' interest in the potential use of ADR to assist in settlement efforts in this case. We believe that the services of a neutral mediator could increase the effectiveness of settlement discussions. Therefore, we have asked RESOLVE, Inc., a non-profit organization providing neutral environmental dispute resolution services, to contact certain representatives of the recipients of this letter to discuss the possible use of ADR to assist in our efforts toward settlement of this matter. However, due to resource constraints, all of the recipients of this letter will not be contacted by Resolve. Therefore, if you wish to participate in the ADR process, you will need to send a written response to this letter.

Although U.S. EPA cannot force any party to take part in this ADR effort, we believe that it is in the best interest of U.S. EPA and all those receiving this letter that they do so. In the event that a recipient of this letter refuses to cooperate in this effort, however, U.S. EPA fully intends to issue special notice letters pursuant to § 122(e) of CERCLA or, if necessary, to issue CERCLA §106 orders to compel these non-participating PRPS to undertake and finance the Remedial

Action ("RA") required at the Site. U.S. EPA also fully intends in the future to seek reimbursement from the PRPs for the significant costs it incurred in undertaking and funding the RI/FS at the Site, and in conducting the PRP search, which are estimated at \$3.5 million as of September 30, 1995, as briefly set forth in the enclosed pages of U.S. EPA's itemized cost summary. ("Exhibit B") In addition, the Respondents may have similar claims related to the work they performed on the Interim Action Operable Unit and in completing the RD.

It is our genuine hope that you and other recipients of this letter will seriously consider voluntarily joining this ADR process, thereby avoiding the substantial transaction cost associated with the alternatives. Please indicate your willingness to participate, in writing, within 14 days from your receipt of this letter. Letters should be directed to me at the above address, using the mail code C-29A.

If you have any questions concerning this letter or your connection to the Site, please feel free to contact me at (312) 886-7164. I look forward to hearing from you in the near future and to an expeditious resolution of this matter.

Sincerely,

Sherry L. Estes  
Assistant Regional Counsel

Enclosure

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## Exhibit A

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JAN 10 1997

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Cincinnati Millacron  
(Carlisle Chemical)  
4701 Marburg Avenue  
Cincinnati, OH 45209

Dow Chemical  
Attn: Mike Kay  
Legal Department  
2030 Dow Center  
Midland, MI 48674-2030

Canadian Oxy Offshore Production Co.  
PM 3129 Rd.  
Atlanta, TX 75551

Borden, Inc.  
630 Glendale-Milford Road  
Lockland, OH 45212-1105

Columbian Chemicals Company  
3097 Parkway  
Briarcliff, OH 44212

Oil & Oxy Gas, U.S.A.  
110 West 7th Street  
Tulsa, OK 74119

Ford Motor Company  
Sharon & Mosteller  
Sharonville, OH 45241

Sealed Air Corporation  
2550 Commerce Blvd.  
Sharonville, OH 45241

Formica Corporation  
10155 Reading Road  
Eventual, OH 45241

General Electric  
10001 Alliance Road  
Blue Ash, OH 45242

Georgia Pacific Corp.  
4710 Dues Drive  
Cincinnati, OH 45014

Monsanto Company  
Attn: Steve Smith F2EA  
800 Lindbergh Blvd.  
St. Louis, MO 63167

Morton International  
Attn: Robert C. Mitchell  
Litigation Counsel  
100 North Riverside Plaza  
Chicago, IL 60606-1596

Velsicol Chemical Corporation  
A. Enrique Huerta  
2603 Corporate Avenue  
Suite 100  
Memphis, TN 38132

C & M Chemical  
1240 Imperial Blvd.  
Dayton, OH 45419

John F. Bushelman Construction  
Company  
11980 Runyan Drive  
Cincinnati, OH 45241

Champion International Corporation  
601 N. "B" Street  
Hamilton, OH 45013-2997

Cincinnati Enquirer  
312 Elm Street  
Cincinnati, OH 45202-2709

Clarke Container  
Attn: Martin E. Clarke  
2040 East Kemper Road  
Cincinnati, OH 45241-1804

C.M. Paula Company  
7773 School Road  
Cincinnati, OH 45249-1590

Fisher Body Shop  
220 W. Bancroft St.  
Toledo, OH 43620

T.R. Ash Company  
P.O. Box 4579  
Lafayette, IN 47903

David Hirschberg Company  
211 Longworth Street  
Lockland, OH 45215

Keenan Oil  
2350 Seymour Avenue  
Cincinnati, OH 45212

King Wrecking  
1441 Gest  
Cincinnati, OH 45230

Mid-Atlantic Mechanical, Inc.  
5240 Lester road  
Cincinnati, OH 45213

MVM, Inc.  
11997 Runyan Drive  
Sharonville, OH 45241

Newberry Construction Company  
10070 Windisch Road  
West Chester, OH 45069

Night Hawk, Inc.  
2722 Symmes Road  
Fairfield, OH 45014

Queen City Barrel Company  
1937 South Street  
Cincinnati, OH 45204

Sanders Waste Collection  
Mrs. Charles Sanders  
Charles Ringel  
10520 Wysecarver Road  
Evendale, OH 45241

Union Carbide Corp.  
400 Techno Center Drive  
Suite 406  
Milford, OH 45150

Whitton Trucking Company  
1748 Fitzpatrick Street  
Price Hill, OH 45204

Oxy USA, Inc.  
Attn: Christian P. Mai  
P.O. Box 300  
Tulsa, OK 74102-0300

Ford Motor Company  
3000 E. Sharon Rd.  
Cincinnati, OH 45241

Monsanto Company  
8044 Montgomery Road  
Cincinnati, OH 45236

Aerona, Inc.  
J. Anthony Kington  
Registered Agent  
17 S. High Street  
Columbus, OH 43215

Aerona, Inc.  
David E. Northrop, Esq.  
Samuels & Northrop Co.  
160 East Broad Street  
Suite 816  
Columbus, OH 43215

Cytec Industries, Inc.  
Linda Douchette-Ashman  
Five Garret Mountain Plz.  
West Paterson, NJ 07424

American Standard Co.  
1114 Avenue of the Americas  
New York, NY 10036

Anchor-Hocking Corp.  
CT Corp. Systems  
Registered Agent  
Carew Tower  
Cincinnati, OH 45202

Anchor-Hocking Corp.  
P.O. Box 600  
Lancaster, OH 43130-0600

Andrew Jergens Company  
2535 Spring Grove Avenue  
Cincinnati, OH 45214-1773

B & O Railroad  
420 East West Street  
Troy, OH 45373

B & O Railroad Company  
St. Clair & Williams  
Lawrenceburg, IN 47025

BF Goodrich  
c/o Mary E. Schultz  
Sr. Environmental Counsel  
3925 Embassy Parkway  
Akron, OH 44333-1799

BFI  
Joel Matthews  
320 Springside Drive  
Suite 250  
Akron, OH 44333

BFI  
11563 Mosteller Road  
Sharonville, OH 45241

Borden, Inc.  
Law Dept. - 27th Floor  
180 East Broad Street  
Columbus, OH 43215

BP Oil Company  
313 West North  
Chillicothe, OH 45601

BP Oil Company  
Division Office  
930 Tennessee Avenue  
Bond Hill, OH 45229

Canadian Oxy Offshore Prod. Co.  
12790 Merit Drive  
Suite 800 LB 94  
Dallas, TX 75251-1270

Chemical Leaman Tank Lines  
Lois Godfrey-Wye  
Willkie Farr & Gallagher  
Three Lafayette Centre  
Washington, DC 20036-3384

City of Reading  
Mayor's Office  
1000 Market Street  
Reading, OH 45215

Columbian Chemicals Company  
Corporate Headquarters  
1600 Parkwood Circle  
Suite 400  
Atlanta, GA 30339

Duff's Famous Smorgasbord  
7914 Dream  
Florence, KY 41042

Formica Corporation  
Attn: Thomas Cifelli, Assoc. Counsel  
155 Route 46 West  
CN-980  
Wayne, NJ 07474-0980

General Motors Corporation  
155 Tri-County Parkway  
Springdale, OH 45246

International Paper Corp.  
Eric Johannesson  
International Place I  
6400 Poplar Avenue  
Memphis, TN 38197

Manville Corporation  
Richard Lotz, Legal Department  
717 17th Street  
Denver, CO 80202

C.L. Hopkins  
Registered Agent  
120 Harding Way West  
Galion, OH 44833

Celotex Corp.  
Lacil Colburne  
320 South Wayne  
Cincinnati, OH 45215

Ciba-Geigy Corporation  
Registered Agent  
Prentice-Hall Corp. Systems, Inc.  
380 South 5th Street  
Columbus, OH 43215-5436

Clarke Sanitary Landfill  
Agent: Thomas J. Clarke  
2040 E. Kemper Road  
Cincinnati, OH 45240

Conrail  
Philip R. Boxell, Jr.  
Associate General Counsel  
Six Penn Center Plaza  
Philadelphia, PA 19103-2959  
E.I. DuPont de Nemours and Co.  
DuPont Legal Department  
D8068  
1007 Market Street  
Wilmington, DE 19898

General Electric  
Nadya Chang  
GE Aircraft Systems  
One Neuman Way MD T165A  
Cincinnati, OH 45215-6301

Globe Valve Company  
P.O. Box 278  
Delphi, IN 46923

Jiffy Packaging Company  
Park 80 Plaza East  
Saddlebrook, NJ 07662

The Maxwell Company  
10300 Evandale Drive  
Evandale, OH 45241

C.M. Paula Company  
Counsel Daniel P. Utt  
Katz, Teller, Brant & Hild  
2400 Chemed Ctr -255 E. Fifth Street  
Cincinnati, OH 45202-4724

Champion International Corporation  
Melinda S. Kamp  
Environmental Projects Manager  
One Champion Plaza  
Stamford, CT 06921

Cincinnati Enquirer  
A. Christian Worrell III  
Graydon Head & Ritchey  
P.O. Box 6484  
Cincinnati, OH 45201

Clermont Waste Collection  
640 Sunny Lane  
Cincinnati, OH 45244

David Hirschberg Steel Company  
P.O. Box 15815  
Cincinnati, OH 45215-00815

Ford Motor Company  
Attn: Robin Couch  
Park Land Towers East, Suite 728  
One Parkland Blvd.  
Dearborn, MI 48126

General Motors Corporation  
Attn: Linda Bentley  
3044 W. Grand Blvd.  
Room 12-149  
Detroit, MI 48202

Hilton-Davis Company  
William Wiegler, Env. Mgr.  
2235 Langdon Farm Road  
Cincinnati, OH 45237

King Container Services, Inc.  
2020 Stapleton Court  
Forest Park, OH 45240

Mecco, Inc.  
211 N. University Blvd.  
Middletown, OH 45042

Moore Battery Company  
4312 Spring Grove Avenue  
Cincinnati, OH 45223

Moore Industrial Battery  
2236 Kroger Building  
Cincinnati, OH 45223

Multi-Color Corp.  
4575 Eastern Avenue  
Cincinnati, OH 45226

New York Central Railroad Co.  
Registered Agent Edward B. Dunlop  
2994 Industrial Blvd.  
Bethel Park, PA 15102

Penn Central Corporation  
Michael L. Cioffi  
American Premier Underwriters, Inc.  
One East Fourth Street  
Cincinnati, OH 45202

PPG Industries, Inc.  
Michelle Ritter  
One PPG Place  
40 South  
Pittsburgh, PA 15272

Quantum Chemical Corp.  
P.O. Box 429549  
Cincinnati, OH 45249

Remington Arms Company, Inc.  
Della Donne Corpus Center  
1011 Centre Road  
Second Floor  
Wilmington, DE 19805-1270

Rumpke Waste Col. & Disposal Sys.  
Chris Russell  
Engineering & Envir. Affairs Div.  
10795 Hughes Road  
Cincinnati, OH 45251

Rumpke Sanitary Landfill  
3882 Stuble Road  
Groesbeck, OH 45251

Shell Oil  
810 Highway 42  
Florence, KY 41042

Elsa-Skinner-Morgan  
8750 Cincinnati-Dayton Road  
West Chester, OH 45069

Elsa Skinner-Morgan  
P.O. Box 159  
West Chester, OH 45071

Steelcraft Manufacturing Company  
9017 Blue Ash Road  
Cincinnati, OH 45242-6825

Techno-Adhesives  
12113 Mosteller Road  
Sharonville, OH 45241

Watson's/J & J Distributing Co.  
Registered Agent: ACFB, Inc.  
600 Vine Street  
Suite 2800  
Cincinnati, OH 45202

King Wrecking  
Attn: Kevin J. Hopper  
7420 Jager Court  
Cincinnati, OH 45230

Night Hawk, Inc.  
P.O. Box 577  
Ross, OH 45061

Union Carbide Corp.  
Carol Dudnick  
39 Ridgebury Road  
Danbury, CT 06817

Dick Clarke  
Agent: Thomas J. Clarke  
2040 E. Kemper Road  
Cincinnati, OH 45240

Clarke's Complete Collection  
Agent: Thomas J. Clarke  
2040 E. Kemper Road  
Cincinnati, OH 45240

Clarke's Incinerations, Inc.  
Agent: Thomas J. Clarke  
2040 E. Kemper Road  
Cincinnati, OH 45240

King Container  
Kevin J. Hopper  
7420 Jager Court  
Cincinnati, OH 45230

International Paper Corporation  
Masonite Corporation  
990 Reading Road  
Mason, OH 45040

Proctor and Gamble Company  
Attn: David E. Ross  
Legal Division  
1 Proctor & Gamble Plaza  
Cincinnati, OH 45202-3315

Proctor and Gamble Company  
8340 S. Mason Montgomery Road  
Mason, OH 45040-9760

Rumpke  
Waste Division - Georgetown  
9346 Sunshine Road  
Georgetown, OH 45121

U.S. Army  
Lt. Col. Michael Lewis  
Environ. Law Sect. Army Litigation Ctr  
901 N. Stuart Street  
Arlington, VA 22203

ACME Wrecking Co., Inc.  
Attn: Stephany Taylor, VP  
3111 Syracuse  
Walnut Hills, OH 45206

Keenan Oil  
Mr. Robert Lehr  
Industrial Service Corp.  
P.O. Box 3220  
Shawnee, KS 66203

Keenan Oil  
CT Corporation System  
813 Carew Tower  
Cincinnati, OH 45202

Keenan Oil  
P.O. Box 4410  
Wichita, KS 67204

Letitia Grishaw, Chief  
Environmental Defense Section  
U.S. Department of Justice  
P.O. Box 23986  
Washington, DC 20026-3986



**Exhibit 2**

**February 11, 1997 letter from Sherry Estes (EPA)  
to PRPs re March 11, 1997 meeting in  
Cincinnati, Ohio**



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 5**  
**77 WEST JACKSON BOULEVARD**  
**CHICAGO, IL 60604-3590**

February 11, 1997

REPLY TO THE ATTENTION OF:

**Dear Skinner Landfill PRP:**

This letter is to invite you to attend a meeting to be held on March 11, 1997, beginning at 11:00 in the Taft Ballroom of the Westin Hotel, 21 E. Fifth Street, Cincinnati, Ohio. The purpose of the meeting is to discuss the United States Environmental Protection Agency's (U.S. EPA) plans with regard to the cleanup of the Skinner Landfill in West Chester, Ohio ("Site"); to review the general sources of information which link parties to the Site; and to offer parties the assistance of a mediator and the use of an alternative dispute resolution (ADR) process to help parties design an equitable allocation procedure to assist them to establish a PRP group. An agenda for the March 11th meeting is attached to this letter.

The reason you are receiving this letter is because U.S. EPA has information which may link you or your client to the site as a potentially responsible party. You may recall that you received a letter from me dated January 8, 1997 in which you were notified that U.S. EPA had determined that you are a potentially responsible party (PRP) at the Skinner Landfill.

Many parties, in response to my January 8, 1997 letter, have indicated an interest in participating in an ADR process. All parties who have requested information regarding the basis of U.S. EPA's determination of potential liability ("nexus information") have received or will shortly receive copies of relevant nexus information regarding your potential involvement at the site. However, it has come to my attention that some of the nexus information previously sent by the steering committee did not contain sufficient explanation of the documents which were enclosed. We are trying to remedy this situation through an additional mailing from Michael T. Kay of The Dow Chemical Company, which will be sent to all prior recipients of the nexus information, and should provide more complete information than that previously forwarded. Additionally, some of you may wish to receive complete copies of any depositions/interview notes which might link you or your client to the Site. If, after receiving additional information from Mr. Kay, you still have questions, or if you would like a complete copy of the deposition/interview notes which purport to link you or your client, please contact Laura Ringenbach at (513) 357-9362.

If you have not received information you have already requested, please contact me at your earliest convenience. My goal is to see that you are provided this information prior to the March 11, 1997 ADR meeting; if this goal is not accomplished, the information will be available on March 11th. If you have not previously indicated an interest in attending the first ADR session, either through a telephone conversation with me or a written response, and do now plan to attend, please call Ms. Ringenbach if you have wish to have copies of the nexus information regarding you or your client available at the meeting.

One of the purposes of the ADR meeting is to assist parties to set up an allocation procedure for potentially responsible parties at the Site. Daniel P. Dozier, Vice President of TLI Systems, Inc., will facilitate discussions among the PRPs and between the PRPs and U.S. EPA. Mr. Dozier will be available to assist parties to consider an allocation procedure and to select an allocator, who could be either Mr. Dozier or another person, as the PRPs collectively decide.

Once an allocation procedure has been established, parties will be able to evaluate the totality of site-related information, provide additional information in connection with the allocation procedure, and raise whatever equitable and legal issues might be appropriate to produce an allocation which is fair, reasonable, and acceptable to the parties. Depending on the preferences of the parties, the allocation procedure could range from mediation, mediation with an allocation recommendation, through non-binding or even binding arbitration.

U.S. EPA is paying for Mr. Dozier's services for a short time to assist parties to establish an allocation procedure and select an allocator. U.S. EPA, however, is only willing to pay a portion of the allocator's/mediator's services beyond this initial convening phase, as U.S. EPA believes that it is important for parties participating in the ADR process to have a financial stake in its outcome. Enclosed is a copy of a May 1995 U.S. EPA fact sheet, "Use of Alternative Dispute Resolution in Enforcement Actions" which provides general information regarding Agency policy concerning the use of these processes. If you are unable to attend or send a representative to the meeting, but still wish to participate in the ADR process, please contact me after the March 11th meeting for the date, time and location of subsequent meetings, as we do not plan on sending any more meeting notices until the special notice letter is sent (discussed below).

U.S. EPA plans on issuing special notice pursuant to Section 122(a) of CERCLA by June 30, 1997. Special notice letters inaugurate a 120-day enforcement moratorium period as provided in CERCLA. During this moratorium period, the Agency is prohibited by the statute from initiating any enforcement activities so long as a good-faith offer is received from PRPs within 60 days of receipt of the special notice. Allocation activities among the PRPs could, of course, continue once special notice is received, but negotiations with U.S. EPA on a good-faith offer should begin shortly after receipt so that the good-faith offer can be made within the 60-day time period.

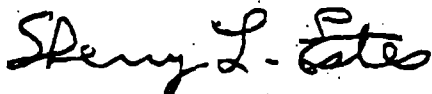
While U.S. EPA hopes and expects that the ADR process will be successful and of value to the PRPs, U.S. EPA, of course, retains all of its enforcement authorities in the event that the process is unsuccessful, or if a good-faith offer is not received by the Agency. Included in the special

notice which will be issued by the end of June, U.S. EPA expects to include an offer pursuant to the Orphan Share Reform guidance, issued in June 1996. This reform allows the Agency to forgive certain percentages of U.S. EPA's past response costs at the Skinner Landfill which otherwise would normally be sought from PRPs, based upon formulas set forth in the June 1996 guidance. As of September 30, 1995, these unreimbursed past response costs totaled approximately \$3.5 million. However, the reform is only available to those parties signing a consent decree with the Agency to conduct or finance the remedial action at the Site.

Among U.S. EPA's other enforcement authorities are unilateral administrative orders (UAOs) for the conduct of the remedial action at the Site, pursuant to CERCLA §106(a). Parties who refuse to comply with any UAOs issued for this Site are potentially subject to \$25,000 per day in statutory penalties, if a judge would determine that the parties' non-compliance was without sufficient cause. Since the stakes for U.S. EPA are the completion of the final remedial action at the Site, U.S. EPA will seek enforcement for any non-compliance with any UAOs issued. If the Agency is forced to bring a claim to enforce a §106(a) order for the final remedial action, that claim will also include any past non-compliance with other administrative orders issued for this Site.

If you have any questions regarding this letter, the ADR process for the Skinner site, or any other legal questions, please contact me at (312) 886-7164. Questions regarding nexus information or the logistical arrangements for the March 11, 1997 meeting should be addressed to Laura Ringenbach at (513) 381-2838. The Westin Hotel's number is (513) 521-7700. If you wish to speak to Mr. Dozier regarding his role, feel free to call him at (301) 718-2270.

Sincerely,



Sherry L. Estes  
Assistant Regional Counsel

Enclosure

cc: Craig Melodia  
James Bell  
Elliot Rockler, DOJ  
Michael T. Kay  
Laura Ringenbach  
Daniel P. Dozier

**AGENDA**

**FIRST ADR CONVENING SESSION**  
**SKINNER LANDELL SITE**  
**MARCH 11, 1997**

**I. Site Background**

- A. Status of Remedial Design**
- B. Enforcement Status**

**II. Description of ADR Process**

- A. Convening Phase**
- B. Allocation Phase**
- C. Possible Mediation With U.S. EPA**

**III. Special Notice Procedures/ Relationship to ADR**

**IV. PRP Portion of Meeting (U.S. EPA leaves room)**

## EXHIBIT 3

### **Exhibit 3**

**February 28, 1997 letter from Karl S. Bourdeau  
(on behalf of the Plaintiffs)**

**NOTE:** The attached letter is a sample of the letters sent to the PRPs. Each letter attached specific documents linking that entity to the Site. These attachments are not included in this Exhibit.

LAW OFFICES  
BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311

Karl S. Bourdeau  
(202) 789-6019  
KBourdeau@bdlaw.com

(202) 789-6000  
TELECOPIER (202) 789-6190

February 28, 1997

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-8400

BEVERIDGE & DIAMOND  
SUITE 400  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-6162

BEVERIDGE & DIAMOND  
SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438  
(415) 397-0100

Michael Steinberg  
On behalf of: Formica Corporation  
Morgan, Lewis & Bockius  
1800 M Street NW  
Washington, DC 20036

**SKINNER LANDFILL SUPERFUND SITE**

Dear Mr. Steinberg:

This firm represents a group of companies, including The Dow Chemical Company, Ford Motor Company, GE Aircraft Engines, Morton International, PPG Industries, Inc., and Velsicol Chemical Corporation (hereinafter "the Group"), in an action to be filed on their behalf in March 1997 in the United States District Court for the Southern District of Ohio. The Group consists of companies that have incurred response costs associated with the Skinner Landfill in West Chester, Ohio ("the Site") and are parties to a Unilateral Administrative Order and Consent Order with the United States Environmental Protection Agency ("EPA") regarding certain activities at the Site. The Complaint will seek from you and a number of other defendants recovery of costs incurred and to be incurred by the Group.

Most of the defendants have already received some background information about the Skinner Landfill from EPA. Upon information and belief, the Site was used for waste disposal from the 1930s until the late 1980s. The Site was operated as a family-owned business from the time the Skinners purchased the property (in or around 1947). All members of the Skinner family that worked at the Site have been deposed or interviewed regarding operations of the landfill and identification of PRPs. In addition, Elsa Skinner, who maintained the accounting records for the Skinner business for the entire time it was in operation, provided an accounting ledger spanning the period 1955 to 1987.

Many parties have already received nexus data that describe the evidence allegedly tying them to the Site. Enclosed with this letter is an additional package referencing your alleged nexus to the Site. This information was obtained through the efforts of EPA and the Group. EPA conducted a Responsible Party Search, took several administrative depositions and conducted several witness

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BEVERIDGE & DIAMOND, P. C.

interviews, and obtained responses to Section 104(e) requests for information from a number of PRPs. The Group hired an investigator to identify additional PRPs and to interview individuals with knowledge of the Site and its customers during the years of operation.<sup>1/</sup>

As we mentioned above, the Group intends to file its Complaint in March, but will temporarily refrain from serving the Complaint on you in the hope that the parties can reach consensus on an Alternative Dispute Resolution ("ADR") process to be conducted in lieu of traditional litigation. We believe that this approach is more equitable and cost effective for all the parties concerned. As you know, EPA has already endorsed such an approach in this case to bring about an allocation that is fair, reasonable, and acceptable to the parties.

As you know, there is a meeting scheduled for March 11, 1997 in Cincinnati to discuss these and other issues. We will provide to you shortly before or at that meeting a model ADR protocol that we would like to use as a starting point for developing a consensual ADR process. The Group wants to stress that you and your client will have input on the type of allocation process that will be most effective for this particular Site. We anticipate using the next month to entertain comments on the ADR procedure and to develop an acceptable ADR process.

We encourage you to attend the March 11<sup>th</sup> meeting. If you have any questions before then, please feel free to call me at (202) 789-6019, Fred Wagner of my office at (202) 789-6041, or Michael Kay at (517) 636-7872.

Sincerely yours,

Karl S. Bourdeau

On Behalf of: The Dow Chemical Company,  
Ford Motor Company, GE Aircraft Engines  
Morton International, PPG Industries, Inc.  
Velsicol Chemical Corporation

Enclosures

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<sup>1/</sup> At the request of EPA, the nexus materials have been redacted in an initial effort to protect the privacy of non-Skinner family member witnesses. We anticipate that full, unredacted versions of the nexus materials will be provided to cooperating PRPs during the course of the ADR proceedings.



## **Exhibit 4**

**March 12, 1997 memorandum from Karl S. Bourdeau (on behalf of the Plaintiffs) which was sent via Federal Express to those PRPs that did not attend the March 11, 1997 meeting in Cincinnati, Ohio**

**NOTE: This memorandum attached several documents which are not included herein. Attachments to the March 12, 1997 memorandum included copies of the sign-up sheet from the March 11 meeting, copies of the overhead projections which were presented at the meeting, and a draft version of the ADR Procedure and Questionnaire.**

March 12, 1997  
**PRIVILEGED DOCUMENT**

**MEMORANDUM**

**VIA EXPRESS DELIVERY**

**TO:** Skinner Landfill Potentially Responsible Parties Not In Attendance At Initial Meeting

**FROM:** Karl S. Bourdeau  
Beveridge & Diamond, P.C.

**RE:** Summary of March 11 Meeting; Review of Proposed Alternative Dispute Resolution Model

As you are aware, a meeting was held in Cincinnati on March 11 concerning the Skinner Landfill Superfund Site (the "Site"). Those who attended this meeting heard several presentations about the current technical and enforcement status of the Site, a proposed Alternative Dispute Resolution ("ADR") plan for the Site, as well as our intention to file litigation on behalf of six companies to recover past and future response costs.

As the enclosed agenda describes, technical consultants discussed the status of remedial work at the Site and summarized the costs incurred and expected to be incurred to implement the selected remedy. Attached hereto is a summary of the presentation from RUST Engineers, which includes recent future cost estimates. Ms. Sherry Estes from the Regional Counsel's Office of the United States Environmental Protection Agency ("EPA") described the agency's search for potentially responsible parties ("PRPs") and the administrative enforcement history at the Site, as well as the possibility that EPA would invoke its orphan share funding authority if parties ultimately sign a Consent Decree. Michael Kay from The Dow Chemical Company discussed the efforts of a group of PRPs to supplement EPA's PRP investigation and summarized the costs incurred by that group to pay for Interim Remedial Measures and to comply with various EPA administrative orders. For your information, we have enclosed the various documents that were distributed in support of these presentations. Dan Dozier of TLI Systems, Inc. described his role as the neutral facilitator and convenor to assist parties to agree on an equitable cost allocation process.

In addition, I described in some detail and answered several questions about a proposal to resolve all cost recovery claims related to the Site in a cooperative ADR procedure. As I explained in my earlier correspondence, my clients intend to file a complaint later this month, but will refrain from serving the complaint in the hope that the parties can reach consensus on an ADR process to be conducted in lieu of traditional litigation. We will also provide a waiver of

service form which, if executed, will allow you or your client up to 60 days to file an answer to the complaint.

I further explained at the meeting that each PRP will have the opportunity to have input on the type of allocation process that will be most effective for this particular Site. To that end, we distributed a model ADR protocol for each PRP's review and consideration. That model is attached hereto. In addition, please find enclosed a schedule by which we intend to entertain comments on the ADR procedure and to develop an acceptable ADR process. The first round of comments on the ADR model are expected by March 20. We encourage you or your client to review the ADR proposal and to send written comments to both my office and to Dan Dozier, in accordance with the enclosed schedule. Comments to Mr. Dozier should be sent to the following address:

TLI Systems, Inc.  
4340 East West Highway  
Suite 1120  
Bethesda, MD 20814

You may also call Mr. Dozier at (301) 718-2270 or fax comments to (301) 718-2277.

Finally, we have enclosed a proposed schedule by which the ADR would be completed using the model under consideration. We explained at the meeting that this schedule is ambitious, but is largely driven by EPA, which wants to see remedial work at the Site begin promptly, intends to issue "Special Notice" letters to all identified PRPs, and desires to obtain a signed Consent Decree for the final remediation of the Site as soon as possible.

Once again, we encourage you to review the ADR procedure and to submit your comments to our office and to Mr. Dozier in accordance with the scheduled enclosed. Please call me at (202) 789-6019 or Fred Wagner of my office at (202) 789-6041 if you have any questions. Our fax number is (202) 789-6190.

O:\CLA\1721\4353\MEMO\4353FRW.04



## **Exhibit 5**

### **April 9, 1997 letters sent to PRPs identified after the March 11, 1997 meeting**

Note: The attached letter is a sample of the same merge letter that was sent to the later identified entities. The April 9 letter included numerous attachments, including the March 12, 1997 memorandum (Exhibit 4) and its attachments, as well as the specific documents linking that entity to the Site. The attachments to the April 9, 1997 letters are not included herein.

LAW OFFICES  
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April 9, 1997

City of Blue Ash  
4343 Cooper Road  
Blue Ash, OH 45242-5699

Re: Skinner Landfill Superfund Site

Dear Sir or Madam:

This firm represents a group of companies, including The Dow Chemical Company, Ford Motor Company, GE Aircraft Engines, Morton International, PPG Industries, Inc., and Velsicol Chemical Corporation (hereinafter "the Group"), in an action filed on their behalf on March 28, 1997 in the United States District Court for the Southern District of Ohio. The Group consists of companies that have incurred response costs associated with the Skinner Landfill in West Chester, Ohio ("the Site") and are parties to a unilateral administrative order and consent order with the United States Environmental Protection Agency ("EPA") regarding certain activities at the Site. The Complaint seeks from you and a number of other defendants recovery of costs incurred and to be incurred by the Group.

Most of the defendants have already received some background information about the Skinner Landfill from EPA. Upon information and belief, the Site was used for waste disposal from the 1930s until the late 1980s. The Site was operated as a family-owned business from the time the Skinners purchased the property (in or around 1947). All members of the Skinner family that worked at the Site have been deposed or interviewed regarding operations of the landfill and identification of PRPs. In addition, Elsa Skinner, who maintained the accounting records for the Skinner business for the entire time it was in operation, provided an accounting ledger spanning the period 1955 to 1987.

Enclosed with this letter is a package referencing your nexus to the Site. This information was obtained through the efforts of EPA and the Group. EPA conducted a Responsible Party Search, took several administrative depositions, and obtained responses to Section 104(e) requests for information from a number of PRPs. The Group subsequently hired an investigator

City of Blue Ash  
April 9, 1997  
Page 2

to identify additional PRPs and to interview individuals with knowledge of the Site and its customers during the years of operation.<sup>2/</sup>

As we mentioned above, the Group has already filed its Complaint, but will temporarily refrain from serving the Complaint on you in the hope that the parties can reach consensus on an Alternative Dispute Resolution ("ADR") process to be conducted in lieu of traditional litigation. We believe that this approach is more equitable and cost effective for all the parties concerned. EPA has already endorsed such an approach in this case to bring about an allocation that is fair, reasonable, and acceptable to the parties.

Enclosed with this letter is a model ADR protocol and a draft allocation questionnaire that will be used as a starting point for developing a consensual ADR process. The Group wants to stress that you and your client will have input on the type of allocation process that will be most effective for this particular Site. EPA has hired Dan Dozier of TLI Systems, Inc. as a convenor whose responsibility is to assist the parties to develop an ADR process. You should send any comments on the ADR model and proposed questionnaire to this office and to Mr. Dozier. Mr. Dozier's address is: TLI Systems, Inc., 4340 East West Highway, Suite 1120, Bethesda, MD 20814.

For your information, those defendants identified earlier in the process have already participated in a first round of comments on the draft ADR model and questionnaire. A telephone conference has been scheduled for Tuesday, April 15 at 2:30 EST, to discuss the revised versions of the ADR model and questionnaire enclosed with this letter. A call-in number and confirmation code is attached.

Finally, a group of PRPs met in Cincinnati on March 11th to discuss the response costs that have been incurred to date and the most recent cost estimate for future remedial work. Representatives of EPA Region V and the Group explained the nature of the PRP search that has been conducted by the government and private parties, and discussed how ADR could be used effectively at this Site. For your information, we have also enclosed the handouts from that meeting, including the first draft of the ADR model and a proposed schedule for the ADR process. Of course, both the model and proposed schedule will be changed based on comments we receive from other PRPs.

---

<sup>2/</sup> At the request of EPA, the nexus materials have been redacted in an initial effort to protect the privacy of non-Skinner family member witnesses. We anticipate that full, unredacted versions of the nexus materials will be provided to cooperating PRPs during the course of the ADR proceedings referenced below.

BEVERIDGE & DIAMOND, P. C.

City of Blue Ash  
April 9, 1997  
Page 3

We encourage you to participate in the April 15 conference call and ADR process. If you have any questions before then, please feel free to call me at (202) 789-6019, Fred Wagner of my office at (202) 789-6041, or Dan Dozier at (301) 718-2270.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Karl S. Bourdeau". The signature is fluid and cursive, with a stylized "K" and a long, sweeping underline.

Karl S. Bourdeau

On Behalf of: The Dow Chemical Company,  
Ford Motor Company, GE Aircraft Engines  
Morton International, PPG Industries, Inc.  
Velsicol Chemical Corporation

Enclosures



## **Exhibit 6**

### **List of Substantive Changes Made to the ADR Procedure after March 1, 1997**

## **Exhibit 6**

### **LIST OF CHANGES TO PROVISIONS OF MAY 1, 1997 SKINNER LANDFILL ADR PROCEDURE<sup>1</sup>**

- **Paragraph 4 et seq.** Minor extensions of certain prior deadlines to conform to the enlargement of time for the selection process for the Allocator agreed to in the May 16, 1997 conference call, discussing Allocator candidates
- **Paragraph 5.** Change in location of local Document Repository from Coolidge, Wall, Womsley & Lombard to an unaffiliated location acceptable to the Parties; denial of access to the Document Repositories for parties who have not paid due and owing Joint Expenses or assessments for administrative costs for use of the Repositories
- **Paragraph 6.** Clarification of the documents to be included in the Document Repositories
- **Paragraph 10.** Elaboration of the procedures by which additional parties can be identified for inclusion in the ADR process (as well as the litigation)
- **Paragraphs 12, 14, 15.** Replacement of the requirement that copies of Initial Position Papers, Initial Comment Briefs, and Reply Briefs be sent to all other parties with a requirement that one copy be sent instead to the local Document Repository (in addition to the copy already required to be sent to the Allocator)
- **Paragraphs 13, 16.** Changes to conform the language in the two provisions relating to the Preliminary Non-Binding Allocation Report and Recommendation and the Final Non-Binding Allocation Report and Recommendation, and to clarify that the Allocator should address “orphan” shares
- **Paragraph 17.** Addition of a provision providing for a period of settlement negotiations among the parties once the Final Non-Binding Allocation Report and Recommendation is issued
- **Paragraph 21.** Minor refinements to the process by which the Allocator can authorize late submissions of position papers and exceedances of page limits
- **Paragraph 22.** A new provision authorizing the Allocator to notify the Parties if the Allocator concludes that a modification of the Process is necessary and confirming the right of the Parties to seek a modification of the Process from the Court by moving for an amendment of the CMO

---

<sup>1</sup> References are to the applicable paragraphs of the proposed CMO.

- **Paragraph 23.** Deferral of the date by which payment of the initial assessment for Joint Expenses is due from June 6 to June 20, 1997
- **Paragraph 24.** In addition to wording changes to “clean up” the confidentiality provisions, changes that would:
  - (1) authorize parties to disclose Shared Information not only to insurers but to indemnitors as well (provided they agree to be bound by the terms of the confidentiality provisions);
  - (2) authorize (but not require) a Party to disclose Shared Information submitted during the ADR process that relates solely to that Party’s own alleged responsibility for Site costs, or to the responsibility of a related person or entity for whom the Party is sought to be held responsible (to address concerns raised by many Parties that each time they are required to provide information relevant to their alleged responsibility for response costs at the Skinner Landfill, they are required to “reinvent the wheel,” and, for example, to allow Parties, if necessary and as they choose, to subsequently use in this litigation analyses and other documents they prepare for purposes of the ADR process); and
  - (3) require parties to take reasonable and appropriate precautions against the inadvertent disclosure of Shared Information by their Agents.
- **Paragraph 26.** Clarification of the due dates for submission of materials by the parties and distribution of materials by the Allocator

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**Exhibit 7**

**Foamseal, Inc. et al. v. The Dow Chemical Co. et al.,**  
**No. 96-71129 (E.D. Mich. Jan. 9, 1997) (Order**  
**Appointing Special Master)**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**FOAMSEAL, INC., et al.,**

**Plaintiffs,**

**v.**

**THE DOW CHEMICAL COMPANY, et al.,**

**Defendants.**

---

**HON. JOHN FEIKENS**

**Case No. 96-71129**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**AKZO NOBEL COATINGS, INC., et al.,**

**Defendants.**

---

**Case No. 95-71470**

**FRANK J. KELLEY, Attorney General  
of the State of Michigan, ex rel.,  
MICHIGAN DEPARTMENT OF NATURAL  
RESOURCES,**

**Plaintiffs,**

**v.**

**A.T. WAGNER, et al.,**

**Defendants.**

---

**Case No. 95-71291**

**FILED**  
JUN 9 2 59 PM '97  
U.S. DISTRICT COURT  
EAST. DIST. MICH.  
OFFICE

**ORDER APPOINTING SPECIAL MASTER**

The Court finds, pursuant to Federal Rule of Civil Procedure 53(b), that the interest of justice would be well served by the appointment of a Special Master for

the purposes of undertaking settlement conferences with the parties and their counsel, collectively or individually.

**I. Appointment**

Having considered the nominations made by the parties,

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JUDICIAL ARBITER GROUP  
1601 Blake St., Suite 400  
Denver, Colorado 80202-1328  
Phone: (303) 572-1919  
Fax: (303) 571-1115

is hereby appointed Special Master ("the Master").

**II. Powers of the Special Master**

The Master is appointed to conduct settlement conferences with the parties and their counsel. The Master shall have and exercise the power to compel the participation of counsel, the parties, and representatives of the parties with authority to enter into settlement; the power to require information from the parties concerning their participation in the litigation or the site which forms its subject matter and, with the consent of parties producing information, to share that information with other parties; the authority to converse with counsel, the parties, or any one of them outside the hearing of other counsel or parties; and the authority to regulate the settlement conferences and process as necessary to their orderly performance.

The Master may not require production of evidence, rule on the admissibility of evidence, compel testimony, or administer oaths. The Master shall make no record of the proceedings nor shall he make any report to the Court other than a

status report.

### **III. Settlement Conferences**

The parties and their counsel shall appear for a joint settlement conference with the Master at such time and place as he may direct. The Master may conduct one or more subsequent, separate settlement conferences between two or more individual parties as he deems appropriate.

Before the initial conference the parties shall submit position statements to the Master and to opposing parties as the Master may direct. The Master may limit the length of those position statements and the supporting documents submitted and may specify the time of their delivery. Position statements or any supplements submitted to the Master may not be filed as part of the record in this case, shall not be subject to discovery, and may not be used in motion practice or in the trial of these cases.

Communications with the Master or with another party during the settlement conferences are not subject to discovery and may not be used by either party in motion practice or in the trial of the cases.

### **IV. Time Schedule**

This Order shall be effective immediately and shall terminate upon July 1, 1997, unless earlier terminated by the Court or unless all outstanding claims among the parties in each case shall be earlier resolved.

### **V. Compensation of the Special Master**

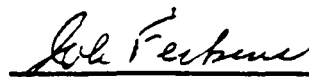
The Master shall be paid an hourly rate of Two Hundred Fifty Dollars and

00/100 (\$250.00) and shall be reimbursed for any reasonable and necessary expenses incurred in the course of his efforts. The Master shall file with the Court and serve on the parties monthly or bi-monthly invoices itemizing his hours worked and expenses incurred together with a recommended equitable allocation of that invoice among the parties. Within ten (10) days from receipt of the Master's invoice, the parties shall file with the Court, and serve upon each other, any objections they may have to the Master's invoice or its allocation. The Court shall approve the fees and expenses of the Master and the allocation of his invoice as deemed appropriate in the discretion of the Court. Payments to the Master shall not be considered costs of the case.

**VI. Stay of Proceedings**

All proceedings in these matters, including the filing of motions, responses or reply, discovery, and arguments upon pending matters, whether before the Court or the Magistrate, are now stayed. The stay here imposed shall remain effective until July 1, 1997, or the termination of this Order. The Master may recommend the consideration of motions required to accomplish or implement the settlement of claims between parties.

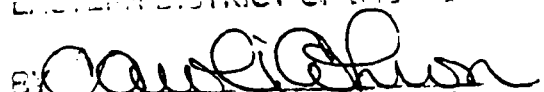
**IT IS SO ORDERED.**



**John Feikens  
United States District Judge**

**Dated:** *January 8, 1997*

**A TRUE COPY**  
CLERK, U. S. DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

  
CLERK

FILED

MAY 20 1997

KENNETH J. MURPHY, Clerk  
CINCINNATI, OHIO

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT CINCINNATI, OHIO

THE DOW CHEMICAL COMPANY, et al.,

Plaintiffs,

**v.**

ACME WRECKING CO., INC., et al.,

**Defendants.**

Civil Action Nos.  
C-1-97-0307 and C-1-97-0308  
(Consolidation Motion Pending)

Judge Weber

THE DOW CHEMICAL COMPANY, et al.,

Plaintiffs,

v.

SUN OIL COMPANY d/b/a SUNOCO OIL  
CORP., et al.,

**Defendants.**

### PLAINTIFFS' SUGGESTION OF COMPLEX CASE

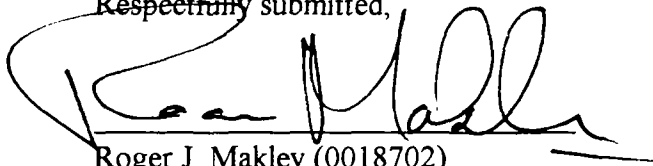
Pursuant to S. D. Ohio L.R. 16.3, Plaintiffs suggest that this matter qualifies as a complex case that warrants unusual pretrial attention and special handling. A brief memorandum providing the basis for this Suggestion is attached.

*(Check all that apply)*

- ☒ Numerous or complicated, and possibly unique legal issues
- ☒ More than five real parties in interest, or class action, or mass tort
- ☒ Unusual factual issues, or anticipated more than three experts per side
- ☒ Likely to require very extensive discovery
- ☒ Likely to require more than 10 trial days
- ☒ Other (explain in 25 words or less)

May 20, 1997

Respectfully submitted,



Roger J. Makley (0018702)  
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CHEMICAL COMPANY, FORD MOTOR  
COMPANY, GE AIRCRAFT ENGINES,  
MORTON INTERNATIONAL, INC., PPG  
INDUSTRIES, INC. AND VELSICOL  
CHEMICAL CORPORATION

Of Counsel:

Karl S. Bourdeau  
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1350 I Street, N.W.  
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Washington, D.C. 20005  
(202) 789-6019

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUGGESTION  
OF COMPLEX CASE**

Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. §§ 9601 et seq., and Ohio common law, Plaintiffs seek recovery of environmental response costs incurred and to be incurred in connection with the cleanup of the Skinner Landfill Superfund Site in West Chester, Ohio ("the Site"). The remediation of the Site has begun under an Administrative Order issued to the Plaintiffs by the United States Environmental Protection Agency ("USEPA") and a final remedy for the Site has been designed by Plaintiffs pursuant to an Administrative Consent Order entered by the Plaintiffs with USEPA. Plaintiffs have incurred approximately \$2,000,000 in response costs thus far in connection with the cleanup of the Site and continue to incur costs.

Plaintiffs' May 20, 1997 Memorandum in Support of Entry of a Case Management Order sets forth in detail the Plaintiffs' remediation efforts at the Site as well as Plaintiffs' proposal for alternative dispute resolution ("ADR") procedures to resolve disputed legal and factual issues. That Memorandum explains the difficulty and size of the case and why the matter should be considered complex under S. D. Ohio L. R. 16.3.

Local Rule 16.3 allows for special handling of complex cases such as this one. Pursuant to that Rule, upon notice to the Court:

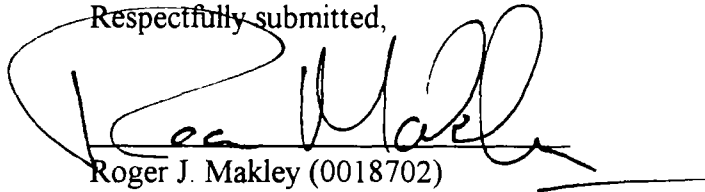
[t]he Court will promptly respond with as much additional attention as the Court's resources permit and as the needs of the case require. The Court will consider employing in such cases: (a) the "Early Neutral Evaluation" technique or other methods of ADR in addition to those afforded all trial-track cases; (b) additional monitoring of discovery, such as requiring (1) an early meeting of counsel, and (2) the joint preparation of a discovery plan for the case; and © such other techniques as appear likely to contribute to the cost effective management of the case.

S. D. Ohio L.R. 16.3. Rule 16.3 provides for special case management techniques, including ADR, which are vital -- and typical -- for a large Superfund case such as this one. See, e.g., Manual for Complex Litigation § 33.7 at 366-67 (3d ed. 1995) (CERCLA cases present litigation unique in character and typically involving large numbers of parties and issues that warrant treatment as complex litigation).

Plaintiffs request that this case be designated complex and therefore eligible for the Court's additional attention and special procedures.

May 20, 1997

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roger J. Makley", is written over a horizontal line.

Roger J. Makley (0018702)

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was served by regular U.S. mail, postage prepaid, this 20th day of May, 1997, upon the following:

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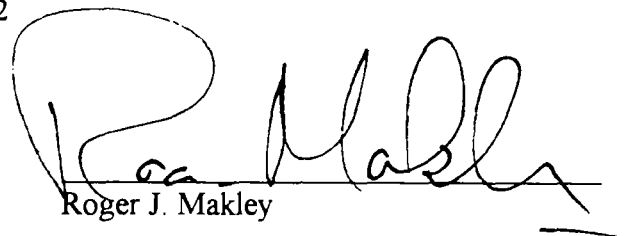
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